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SUPREME COURT, U.S.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-986

ARKANSAS LOUISIANA GAS COMPANY, *Petitioner,*

v.

FRANK J. HALL, MRS. W. E. HALL, SR., THE H. M. HARRELL TESTAMENTARY TRUST, JAMES E. HARRELL, JOHN K. HARRELL, SR., ASA BENTON ALLEN, SIDNEY G. MYERS, JR., W. O. COCHRAN, THOMAS F. PHILYAW, MRS. ELAINE ALLEN, JAMES A. NOE, D. B. MCCONNELL, MRS. EVA L. WEISS, SOL KAPLAN and NATIONAL AMERICAN BANK, New Orleans, Co-Testamentary Executors of the SUCCESSION OF SEYMOUR WEISS, *Respondents.*

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEAL, SECOND CIRCUIT, STATE OF LOUISIANA.

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEAL, SECOND CIRCUIT, STATE OF LOUISIANA.

TO THE HONORABLE THE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

ARKANSAS LOUISIANA GAS COMPANY prays that a Writ of Certiorari issue to review the judgment and decree of the Court of Appeal, Second Circuit, State of Louisiana, entered in this cause on May 1, 1978 setting aside the judgment of the First Judicial District Court

of Louisiana in and for Caddo Parish rendered on the 5th day of December, 1977, and remanding the cause to said District Court with directions.

I. OPINIONS BELOW.

A copy of the opinion and decree of the Court of Appeal is attached in the appendix to this petition, page 2a; it is reported at 359 So.2d 255. Petitioner and Respondents filed applications in the Court of Appeal for rehearing, both of which were denied by order entered on June 6, 1978; see App. p. 21a.

Respondents and Petitioner each timely applied to the Supreme Court of Louisiana for a writ of certiorari or review of the judgment of the Court of Appeal. Petitioner's application was denied by an order of the Louisiana Supreme Court entered September 22, 1978 (App. p. 22a); and Respondents' application, which sought review and reversal of a part of the judgment of the Court of Appeal in favor of Petitioner, was granted by an order entered the same date (App. p. 23a) and is still pending in the Supreme Court of Louisiana.

The opinions in this cause of the First Judicial District Court of Louisiana in and for Caddo Parish are not reported. The original opinion dated October 14, 1977 and opinion denying new trial dated December 2, 1977 are included in the Appendix respectively at pages 24a and 39a; and the trial court's judgment is reproduced at Appendix p. 44a.

II. JURISDICTION.

The judgment of the Court of Appeal was entered May 1, 1978, rehearing was denied on June 6, 1978, and

by order entered September 22, 1978 the Supreme Court of Louisiana refused to review said judgment against Petitioner; the judgment of the Court of Appeal, Second Circuit, State of Louisiana, of which review and reversal are here sought is, under the judicial and procedural system of Louisiana, a judgment of the highest court of the State of Louisiana in which a decision in this cause could be had. The judgment of which review is sought is a final judgment within the meaning of the jurisdictional statute, *United States Code,* Title 28, § 1257(3), (App. p. 1a) as interpreted by this Court in its recent decisions, particularly *Cox Broadcasting Corporation* v. *Cohn,* 420 U.S. 469 (1975).[1]

III. QUESTIONS PRESENTED.

Central to the lawsuit involved in this case are the questions of whether the favored nation provision of Respondents' FPC Rate Schedule was activated by Petitioner's payment to the United States Government of value royalties at a rate higher than prices paid by Petitioner to Respondents under Respondents' FPC Rate Schedule and, if it were activated, what prices Respondents may collect from Petitioner.

The questions presented are: (1) whether the court below erred in failing to refer to the Federal Power Commission the interpretation of the favored nation

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[1] Since a decision in Petitioner's favor on the jurisdiction of the District Court or on the meaning and effect, under the *Natural Gas Act* (15 U.S.C. § 717, et seq.), of the price escalation provision of Respondents' Rate Schedule will be determinative of all issues in the case, Petitioner submits that, under the rules established by this Court in the *Cox Broadcasting Corporation* decision, *supra,* the judgment of the Court of Appeal is final and reviewable; see 420 U.S. 482, 483.

provision of Respondents' FPC Rate Schedule, whether the favored nation provision was activated, and, if the favored nation provision were activated, the prices that Respondents may collect under the *Natural Gas Act* and the Regulations thereunder.

(2) Whether the Court of Appeal's judgment as to the Small Producer status of Respondents and the computation of their recovery was in accordance with the *Natural Gas Act* and Commission Regulations.

IV. STATUTES AND REGULATIONS INVOLVED.

The statute of the United States involved, rights under which have been denied to Petitioner by the Louisiana courts, is Section 4 of the *Natural Gas Act*, 52 Stat. 822, 15 USC § 717c, and Regulations thereunder of the Federal Power Commission (the "Commission"),[2] *Code of Federal Regulations*, Title 18, §§ 154.92, 154.93, 154.94, 154.95, 157.40, copies of which are at App. p. 52a, 54a, 55a, 60a, and 60a.

V. STATEMENT OF THE CASE.

Petitioner ("Arkla") is an integrated gas utility engaged in all phases of the natural gas business in Arkansas, Louisiana, Texas and Oklahoma, and to a limited extent in Kansas and Missouri. It is a "natural gas company" as that term is defined in Section 2(6) of the *Natural Gas Act*, subject to the jurisdiction of

[2] The period covered by the judgment in this cause ended December 31, 1975, before the Federal Energy Regulatory Commission on October 1, 1977 succeeded to the functions and regulatory responsibilities of the Commission. The term "Commission" refers to Federal Energy Regulatory Commission as to matters occuring after October 1, 1977.

the Commission. Respondents are engaged in the production of natural gas and the sale thereof to Arkla in interstate commerce for resale and they also are "natural gas companies," as defined in Section 2(6) of the *Natural Gas Act*, subject to the jurisdiction of the Commission.

On January 11, 1952 Respondents, or their predecessors, entered into a written agreement with Arkla providing for the sale by them to Arkla of natural gas (including extractable liquids but not including condensate) to be produced from Respondents' wells in the Sligo Gas Field, Bossier Parish, Louisiana for a primary term expiring in 1980. After the decision in *Phillips Petroleum Company* v. *Wisconsin*, 374 U.S. 672 (1954), Respondents filed for and received a Certificate of Public Convenience and Necessity from the Commission in Docket No. G-3891 authorizing the sales. The 1952 contract was filed with the Commission and became Respondents' FPC Gas Rate Schedule No. 4. Under the price provisions of this contract the price to be paid by Arkla to Respondents for the gas, including all liquids contained therein except condensate, was $0.06997 with escalations each five years until the price became $0.11496 in 1975.

Section 8(D) of Respondents' gas sales contract and Rate Schedule contains the escalation provision which the parties refer to in this suit as the "favored nation provision" and which is quoted, so far as here relevant, as follows:

> "If at any time during the term of this agreement Buyer should purchase from another party seller gas produced from the subject wells or any other well or wells located in the Sligo Gas Field at a higher price than is provided to be paid for gas

delivered under this agreement, then in such event the price to be paid for gas thereafter delivered hereunder shall be increased by an amount equal to the difference between the price provisions hereof and the concurrently effective higher price provisions of such subsequent contract; *provided that in determining whether a given price is in fact 'higher' than the price provisions of this contract, the inquiry shall not be limited to the actual prices stipulated but due consideration shall also be given to a comparison of all other pertinent provisions of the two contracts, such as point of delivery, basis of measurement, taxes, dehydration, and delivery pressures* (provided that the number of years stated as the terms during which the two contracts shall respectively remain in force and effect shall not be a factor to be considered for purposes of comparison under this paragraph) and the price to be thereafter payable in accordance with this paragraph for gas delivered hereunder shall be adjusted accordingly insofar as may be necessary to make allowances for any discrepancies as may exist between such comparable provisions of the two contracts. It is agreed that any such higher price for gas delivered hereunder shall be effective on the first day of Buyer's accounting month (as elsewhere herein defined) next following the effective date of such subsequent contract, all subject, however, to any rules and regulations of the Office of Price Stabilization or any other regulatory body having jurisdiction." [Emphasis added].

Proceedings in the Trial Court

This suit was begun in 1974 in the First Judicial District Court of Louisiana in and for Caddo Parish. The suit claims that payments made by Arkla to the United States (which were made beginning in 1961) as royalty under an oil and gas lease (covering parts of the Barksdale Field Reservation in Bossier Parish in the Sligo

Gas Field) amounted in law to purchases of gas from a party seller and "triggered" the favored nation clause; and that Arkla has thereby incurred substantial liabilities to Respondents for higher rates for gas sold.

Under the provisions of the lease, the United States is entitled to a royalty of 16⅔% of the amount or value, at the option of the United States, of the production obtained from the leased lands. Under the terms of the government lease and the authority of the *Mineral Leasing Act,* 30 USC §§ 226, et seq., the Department of the Interior, acting through the United States Geological Survey, has the right to make a binding determination as to the value of the oil and gas produced by the lessee for the purpose of computing the amount of the value royalty. This right was exercised by notice in the form of letters to Arkla fixing the value of Arkla's share of the production from the government lease at unit values higher than the Respondents' contract prices with Arkla.

Arkla has paid royalties to the United States, under the government lease, calculated as being 16⅔% of the value of Arkla's 15% of the production from the government lease, determined, as required by the lessor, at the unit values referred to in the preceding paragraph, including value of extracted products at the price at which sold by Arkla, with no deduction for the cost of extraction.

Opinion and Judgment of Trial Court

The District Court entered two opinions—on October 14, 1977 (App. p. 24a) and on December 2, 1977 (App. p. 39a). Its judgment in favor of Respondents is at

Appendix page 44a. The court held that as a matter of oil and gas law, the United States owned the gas as it was produced and that, therefore, the value royalty was paid by Petitioner as the price of a sale and triggered the favored nation provision of the contract.

The trial court also held, on the authority of the Louisiana decision of *Interstate Natural Gas Co.* v. *Mississippi River Fuel Corp.*, 220 La. 43, 55 So.2d 775 (1951), that Respondents could not recover additional price for gas sold in the period 1961 to October, 1972 (when, the court held, Respondents attained the status of Small Producers) because they had made no Commission filing for the increased contractual rate. The court granted them judgments (App. p. 44a) for its calculated "favored nation" price increase for the period October, 1972 to December, 1975.

The demands of one of plaintiffs, W. E. Hall, Jr., were rejected on the ground that he had agreed to an amendment of his contract with Arkla deleting the favored nation clause. It should also be stated that by an earlier opinion (App. p. 46a) the District Court had entered an interlocutory order overruling Petitioner's declinatory exception to the court's jurisdiction on the ground that the Commission was vested with primary and exclusive jurisdiction over the questions presented by the lawsuit.[3]

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[3] Following the overruling of its declinatory exception, Respondent filed a petition with the Commission for a declaratory order construing Respondents' rate schedule and determining the rates at which each of Respondents was entitled to be paid in the period involved in this suit. The Commission, while agreeing that it had jurisdiction, denied the petition, holding that it would defer to the state court. Petitioner sought review of the Commission's order in the United States Court of Appeals for the District of Columbia Circuit (Case No. 77-1146, *Arkansas Louisiana Gas Company* v. *Federal Power Commission*). During pendency of the review proceedings, the Commission sought, and the Court of Appeals granted, remand of the declaratory proceeding to the Commission for further consideration.

Opinion of Court of Appeal

On appeals by all parties to the Louisiana Court of Appeal, Second Circuit, that court in an opinion entered May 1, 1978 (App. p. 2a), reported at 359 So.2d 255, affirmed the District Court's judgment in all respects except as to *quantum*. On the basic issue of Arkla's liability the Court of Appeal's reasoning was different from the trial court's ruling: the appeal court in a short paragraph in its opinion (App. p. 9a) rejected the ground on which the District Court had found Arkla liable, holding that Arkla was correct in arguing that its payment to the federal government of royalty was a payment of rent and not the payment of the price of a sale. The court then went on to say:

> "We nevertheless find it inappropriate to accept the technical and restrictive interpretation on the term 'purchase from another party seller' relied on by defendant under the circumstances shown in this instance."

The court concluded that the favored nation provision should be construed in the interest of the seller and held that it was activated.

As to *quantum*, the Court of Appeal affirmed the District Court as to Respondents' Small Producer status and reversed and remanded the judgment for recalculation with directions that, as Petitioner submits, ignored constraints imposed by Commission regulations.

Respondents applied to the Supreme Court of Louisiana for review of the Court of Appeal's judgment and decree insofar as they rejected their demands, and Petitioner applied for review of that part of the judgment against it. Respondents' application was granted and Petitioner's application denied by separate orders entered September 22, 1978 (App. pp. 23a and 22a).

Federal Questions Raised in Lower Courts

Petitioner recounts its continuous and repeated efforts to protect and achieve its rights and immunities which it has specially set up and claimed under the *Natural Gas Act:*

(1) Petitioner's answer to Respondents' petitions in the trial court put at issue, in part in reliance on the *Natural Gas Act,* Respondents' interpretation of the favored nation provision of their Rate Schedule; and set up, in the alternative, defenses under the *Natural Gas Act* as to Respondents' right to recover any amounts not in accord with their rates on file and effective under the *Natural Gas Act.*

(2) The rules of the Louisiana courts of appeal include Rule IX-A which requires that the appellant specify the errors in the lower court's opinion of which he complains and provides further as follows:

> "Ordinarily, however, the courts of appeal will review only issues which are submitted to the trial court and which are contained in the specification of errors in the briefs or in an application for writs, unless the interests of justice clearly require otherwise."

Petitioner's brief in the Court of Appeal specified, and among others, the following errors and issues:

(a) The error of the District Court in holding that it had jurisdiction of the case.

(b) The error of the District Court in holding that the favored nation clause was activated, in part on the ground that such holding was contrary to the *Natural Gas Act* and the decisions of the courts of the United States thereunder.

(c) The error of the District Court, under the provisions of the *Natural Gas Act*, in permitting change to be made in Respondents' sales contract without approval of the Federal Power Commission, and the consequent errors in the court's computation of Respondents' recovery.

(d) The District Court's error in holding that all of plaintiffs had the status, under the *Natural Gas Act,* of "Small Producers".

(e) The issue of the correctness of the trial court's decision that Respondents' could not recover additional price, without a filed rate, in the period 1961 to October, 1972.

(3) In its application to the Court of Appeal for rehearing dated May 15, 1978, Petitioner again insisted upon its rights under the *Natural Gas Act.*

(4) In its application to the Supreme Court of Louisiana for review of the judgment and decree of the Court of Appeal, Petitioner's Assignments of Error raised the same issues which were argued in the Court of Appeal.

Throughout this litigation Petitioner has insisted upon its rights, privileges and immunities under the federal law which have been, with limited exceptions, denied to it by the Louisiana courts.

VI. REASONS WHY A WRIT OF CERTIORARI SHOULD BE GRANTED.

A. The Louisiana courts do not have power or authority to determine the rate at which Respondents' gas was or will be sold. One of the few questions recurring under the *Natural Gas Act* which has been well settled is that neither the regulatory commission nor any court has power to fix retroactively a price at which gas has been sold; a corollary is that they cannot entertain a damage suit, under a contract or otherwise, in which the plaintiff's claim depends upon proof as to a rate which is other than that lawfully on file with the Commission, in the case of gas under the *Natural Gas Act,* and in the case of electric power under the *Federal Power Act.* See *Natural Gas Pipeline Co.* v. *Panoma Corp.,* 349 U.S. 44 (1955); *Socony Mobil Oil Co.* v. *Brooklyn Union Gas Co.,* 299 F.2d 692 (5th Cir. 1962), *cert. denied,* 371 U.S. 887 (1962); and *Montana-Dakota Utilities Co.* v. *Northwestern Public Service Co.,* 341 U.S. 246, 251 (1951), in which this Court said of a suit similar to Respondents' suit here:

> "... It can claim no rate as a legal right that is other than the filed rate, whether fixed or merely accepted by the Commission, and not even a court can authorize commerce in the commodity on other terms."

B. The Commission, not the courts, should interpret Respondents' FPC Rate Schedule. This Court has consistently held that matters involving the interpretation of a tariff or rate schedule should be decided by the regulatory agency in the first instance. See *Texas & Pacific R. Co.* v. *American Tie & Timber Co.,* 234 U.S. 138 (1914); *Far East Conference* v. *United States,* 342 U.S. 570 (1952); *United States Navigation Co.* v. *Cunard Steamship Co.,* 284 U.S. 474 (1932); and *Port of Boston Marine Terminal Assn.* v. *Rederiaktiebolaget Transatlantic,* 400 U.S. 62 (1970).

The jurisdiction of the Commission over a gas purchase contract on file with the Commission as a rate schedule has been recognized by this Court. See *Northern Natural Gas Co.* v. *State Corporation Commission,* 372 U.S. 84, 85, 92 (1963); *United Gas Pipe Line Co.* v. *Mobile Gas Service Corp.,* 350 U.S. 332 (1956); *FPC* v. *Sierra Pacific Power Co.,* 350 U.S. 348 (1956); *United Gas Pipe Line Co.* v. *Memphis Light, Gas & Water Division,* 358 U.S. 103 (1958). In these same cases, the Court has approved the Commission's regular practice of interpreting contracts on file with it as rate schedules, and of determining the meaning of such rate schedules.

The Louisiana Court of Appeal's error in rejecting Petitioner's argument that the Commission has primary jurisdiction is apparently based on its understanding of the law which it expressed as follows (App. pp. 7a-8a):

> "Defendant's initial argument is in error because the relief sought is not that of a rate increase but is instead a claim for damages arising under state contract law. . . . [This court] is a proper forum for adjudication of a state contract law dispute. Furthermore, the Natural Gas Act evinces no purpose to abrogate private rate contracts. . . . The

> Act recognizes the rights of the parties to rates established by individual contract and does not alter ordinary contractual relationships where the controversy is one of ordinary contract law. . . . A claim founded on state contract law does not lose its character just because the Natural Gas Act is in some way involved."

The emphasis placed by the Court of Appeal upon the fact that the Rate Schedule began as a contract between private parties, loses sight of the fact that it is no longer subject to the parties' will. Rather, the contract and any proposed changes must conform strictly to the *Natural Gas Act* and the procedures required thereunder.

The interpretation of the favored nation provision of the Rate Schedule requires the expertise and special competence of the Commission. For example, the provision not only requires a comparison of prices but also requires a comparison of provisions of the two contracts, such as "point of delivery, basis of measurement, taxes, dehydration, and delivery pressures," among others, to determine "whether a given price is in fact 'higher' than the price provisions" of the contract between Petitioner and Respondents. The interpretation of the Rate Schedule also involves questions of policy, e.g., is the rate provided by the Rate Schedule favored nation clause just and reasonable; should the Rate Schedule be construed broadly in favor of lower gas rates, or should it be construed broadly in favor of higher prices for the independent producer natural gas company; is the producer the kind of seller contemplated and are the words "purchase" and "seller" used as they are commonly employed in the gas industry. The court below should have referred the question of whether the favored nation clause was triggered to the Commission together with the question of the appropriate price if it was triggered.

This Court in its opinion in *United States* v. *Western Pacific R. Co.*, 352 U.S. 59, 63-64 (1956), compared the rules with respect to "primary jurisdiction" and the rules with respect to "exhaustion of administrative remedies" as follows:

> " 'Exhaustion' applies where a claim is cognizable in the first instance by an administrative agency alone; judicial interference is withheld until the administrative process has run its course. 'Primary jurisdiction,' on the other hand, applies where a claim is originally cognizable in the courts, and comes into play whenever enforcement of the claim requires the resolution of issues which, under a regulatory scheme, have been placed within the special competence of an administrative body; in such a case the judicial process is suspended pending referral of such issues to the administrative body for its view."

The Court in the *Western Pacific* case also called attention to its decision in *Great Northern R. Co.* v. *Merchants Elevator Co.*, 259 U.S. 285 (1922), where it had held that "where the question is simply one of construction the courts may pass on it as an issue 'solely of law.' " 352 U.S. at 66. But then the Court went on to say:

> "But where words in a tariff are used in a peculiar or technical sense, and where extrinsic evidence is necessary to determine their meaning or proper application, so that 'the enquiry is essentially one of fact and of discretion in technical matters,' then the issue of tariff-application must first go to the

> Commission. The reason is plainly set forth: such a 'determination is reached ordinarliy upon voluminous and conflicting evidence, for the adequate appreciation of which acquaintance with many intricate facts of transportation is indispensable; and such acquaintance is commonly to be found only in a body of experts.' "

The issue of triggering in the present suit surely is one of those that is required to be passed on, under the decisions of this Court, in the first instance by the Commission. The Commission has described in several cases the burden of proof on a producer in order for the Commission to hold that a favored nation clause has been triggered by the purchaser paying another producer a higher rate; see *Shell Oil Co., et al,* Memorandum Opinion No. 382, 29 F.P.C. 498, 499 (1963); aff'd, *Shell Oil Co.* v. *FPC,* 334 F.2d 1002 (3rd Cir. 1964); *West Texas Gathering Company,* 29 F.P.C. 510 (1962); and *Morris Mizel, et al.,* Opinion No. 407, 30 F.P.C. 1103 (1963). In order for the triggering to occur, the producer filing the most favored nation rate increase must show, *to the Commission:*

(1) that the other producer is the type of seller contemplated and producing in the area indicated;

(2) that the gas being purchased from the other purchaser is comparable gas;

(3) that the rate being paid for it is higher in fact as well as in appearance;

(4) that the rate sought is a just and reasonable rate; and

(5) that the "purchase" compared is in fact an agreement of the type contemplated.

The uniformity of rate regulation under the *Natural Gas Act* requires that the Commission determine whether triggering occurred in the instant case measured against these standards.

The Rayne Gas Field case, *United Gas Improvement Co.* v. *Continental Oil Co.,* 381 U.S. 392 (1965), illustrates precisely the reason that the Commission should determine the meaning and legal effect of contracts for the sale of natural gas subject to the Commission's jurisdiction. In that case the Commission determined, largely on the basis of the dominant price reducing purpose of the *Natural Gas Act,* that the assignment, or sale, of developed oil and gas leases in the Rayne Gas Field, in Louisiana, to an interstate pipeline was, under the *Natural Gas Act,* a sale of gas in interstate commerce; and this Court affirmed the Commission's determination, a decision which almost certainly would not have been reached by a Louisiana court.

The present suit was tried for many days (the transcript contains 4,987 pages of testimony) and 367 exhibits were introduced by plaintiffs and 87 by defendant. It involves the meaning and application of terms that call into play the expertise of the Commission in the field of natural gas and the need for uniformity in their application under the *Natural Gas Act.* As this Court stated in *Great Northern Co., supra,* "the enquiry is essentially one of fact and of discretion in technical matters," which requires that "the issue of tariff application must first go to the Commission."

The Louisiana Supreme Court is committed to, and has recently reaffirmed, the necessity of exhaustion of administrative remedies and the need to respect the primary jurisdiction of an administrative tribunal,

which this Court pointed out in the *Western Pacific R. Co.* case, *supra*. See also, *Steeg* v. *Lawyers Title Insurance Corp.*, 329 So.2d 719 (La. Sup. Ct. 1976); *Porter* v. *O'Neal*, 205 La. 445, 17 So.2d 622 (1944); *O'Meara* v. *Union Oil Co.*, 212 La. 745, 33 So.2d 506 (1948).

The Louisiana courts have consistently deferred to the administrative remedy where the question before the court has been one within the jurisdiction and competence of a Louisiana administrative tribunal, regardless of whether or not the administrative tribunal has been granted exclusive jurisdiction. Their failure in this case to defer to the competence and expertise of a federal commission which has power and jurisdiction to decide the issue before it, and where the federal courts would be bound to defer to the administrative tribunal under the settled federal law,[4] is denial to Petitioner of a right granted to it by the federal law.

C. Under federal law, which is determinative of the triggering issue, the payment of royalty to the United States as lessor did not activate the favored nation clause, which was conditioned on the "purchase from another party seller"; and the Court of Appeal committed error in failing to recognize the features of the contract which are governed by federal law and that federal law controls the interpretation of the contract.

The Court of Appeal in adopting a broad interpretation of the contract favoring the seller (359 So.2d 261, App. pp. 9a-10a) ignored controlling federal decisions furnishing a definition of the terms used.

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[4] See the order entered on September 6, 1978 in *Tenneco Oil Co.* v. *FERC*, 580 F.2d 722 (5th Cir. 1978).

In *Mobil Oil Corporation* v. *FPC*, 364 F.2d 256 (D.C. Cir. 1971); *cert. den. sub. nom., FPC* v. *Mobil Oil Corporation*, 406 U.S. 976 (1972), the court held, what is now the settled federal law, that a royalty settlement under an ordinary market value oil and gas lease was not in fact a sale of gas in interstate commerce over which the Commission had rate jurisdiction; and that neither under the common understanding of the words used, industry parlance, economic equivalent or any other foundation, was the royalty settlement a sales transaction. See also, *Burnett* v. *Harmel*, 287 U.S. 103 (1932).

In *Northern Natural Gas Co.* v. *State Corporation Commission*, 372 U.S. 84 (1963) this Court determined that conservation orders of the Kansas State Corporation Commission were invalid because they would interfere with the producer contracts "duly filed with the Federal Power Commission" which are within the "paramount and exclusive authority" of the federal agency, 372 U.S. at 85, 92. The Court said, 372 U.S. at 91-93:

> "These state orders necessarily deal with matters which directly affect the ability of the Federal Power Commission to regulate comprehensively and effectively the transportation and sale of natural gas, and to achieve the uniformity of regulation which was an objective of the Natural Gas Act. They therefore invade the federal agency's exclusive domain."
>
> * * * *
>
> "It may be true, as the State Commission urges, that accommodation on the part of the Federal Power Commission could avoid direct collision—but this argument misses the point. Not the federal

> but the state regulation must be subordinated, when Congress has so plainly occupied the regulatory field."

In *Appalachian Power Co.* v. *FPC*, 529 F.2d 342 (D.C. Cir. 1976) *cert. denied*, 429 U.S. 816 (1976), it was held "that the Commission had properly treated [state] law as irrelevant to the interpretation of contracts" on file as rate schedules, 529 F.2d at 347. The Commission's order in *Appalachian Power Co.*, 49 F.P.C. 387, 388 (1973) was affirmed, where it was held:

> "[S]tate law is not relevant to these wholesale rates, which are under the jurisdiction of the Federal Power Commission."

Terms used in the *Natural Gas Act* and in a Commission Rate Schedule should not have one meaning if they come from Texas and another meaning coming from Louisiana. See *United Gas Improvement Co.* v. *Continental Oil Co.*, 381 U.S. 392 (1965), where the Court said, 381 U.S. at 400:

> "A regulatory statute such as the Natural Gas Act would be hamstrung if it were tied down to technical concepts of local law."

Of more importance than the Louisiana court's excessive liberality with the terminology used in the contract is its failure to observe the rules of interpretation established by this Court under the *Natural Gas Act*. As the Court said in *Phillips Petroleum Co.* v. *Wisconsin*, 347 U.S. 672, 685:

> "Protection of consumers against exploitation at the hands of natural gas companies was the primary purpose of the Natural Gas Act."

See also, *United Gas Improvement Co.* v. *Continental Oil Co., supra, FPC* v. *Transcontinental Gas Pipeline Corp.*, 365 U.S. 1 (1961); *Sunray Mid-Continent Oil Co.* v. *FPC*, 364 U.S. 137 (1960); *NAACP* v. *FPC*, 425 U.S. 662 (1976); *FPC* v. *Tennessee Gas Transmission Co.*, 371 U.S. 145 (1962); *FPC* v. *Louisiana Power & Light Co.*, 406 U.S. 621 (1972).

It is obvious that the Court of Appeal did not adopt a construction of the Rate Schedule which would carry out the *Natural Gas Act's* primary purpose of protection of consumers against exploitation. Nor did it refer to the Commission's policy, in effect for more than 15 years, of refusing to permit indefinite price escalation provisions (favored nation provisions) in newly filed rate schedules; *Code of Federal Regulations*, Title 18, § 154.93 (App. p. 54a). The Court of Appeal's reference to the prevention of discrimination by the buyer furnishes extremely tenuous support; and the court noted in its opinion (App. p. 9a) that Petitioner had refused to make market value the trigger of the favored nation provision. A lessee has no choice under the ordinary form of oil and gas lease as to the payment to his lessor of market value in calculating the royalty. It is common knowledge that a high price for natural gas is supported in Louisiana as a matter of public policy, enhancing the interest of one of the dominant industries of the state in which the citizens generally, owning the land and drawing royalties, have the same interest as the gas producer. It is also well known that the State of Louisiana depends in major part for its public revenues upon taxes levied on the production of oil and gas. Since the only reason given by the Court of Appeal for its very broad interpretation does not bear analysis, we submit that we are justified in assigning

the state policy for high oil and gas prices as the public policy adopted by the courts.

D. The Court of Appeal prescribed detailed directions as to how the computation should be made of Respondents' increased prices (App. pp. 17a-20a), a matter which surely should be decided by the Commission alone.

The gas contract between Respondents and Petitioner provided for the delivery of gas at wellhead and payment of the price which was specifically stated as including such liquids as could be extracted from the gas. The lease contract between Petitioner and the United States, as administered by the United States Geological Survey, required Petitioner to process the gas for extraction of liquids (at no cost to the government) and base its royalty settlement on the reduced volume as it issued from the tailgate of the extraction plant plus a settlement for the market value of the extracted liquids. The government also required Arkla to process the condensate (oil produced with the gas, which in the case of Respondents' contract Petitioner was under no obligation to buy), and to pay the United States, without deduction, the market value of the upgraded product.

In the guise of making the "price" under the gas purchase contract comparable with the "price" under the oil and gas lease, the remand order of the Court of Appeal has the effect of requiring the lower court to adopt the same settlement provisions as are in the royalty settlements with the United States.

Without going into detail, this will have the effect of (1) requiring significant changes in Respondents' Rate Schedule and (2) raising the total consideration

for the gas to be paid to Respondents materially above the maximum area rates. The first is flatly in conflict with Section 4 of the *Natural Gas Act* and the regulations thereunder, as a change in Respondents' Rate Schedule will be required; and the second flatly conflicts, even conceding that all of Respondents are Small Producers, with the Small Producer regulations, which limit contractual price increases to the area rate.

E. This suit presents important questions in the administration of the *Natural Gas Act* which will affect not only this case but many others: first, should the meaning and effect of gas rate schedules be determined by state courts applying local law; and second, and equally important, should a state court in construing a gas rate schedule apply state contract law and local legal policy, or is it bound to apply federal law and controlling precedents and policies under the *Natural Gas Act*.

VII. CONCLUSION.

For the reasons stated, a writ of certiorari should be granted in this case to review the judgment rendered May 1, 1978 in this case by the Court of Appeal, Second Circuit, State of Louisiana.

Respectfully submitted,

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APPENDIX

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APPENDIX A

United States Code, Title 28.

§ 1257. STATE COURTS; APPEAL; CERTIORARI

Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:

(1) By appeal, where is drawn in question the validity of a treaty or statute of the United States and the decision is against its validity.

(2) By appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity.

(3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States. June 25, 1948, c. 646, 62 Stat. 929.

APPENDIX B

No. 13,549

COURT OF APPEAL
SECOND CIRCUIT
STATE OF LOUISIANA

• • • • •

May 1, 1978

FRANK J. HALL, ET AL, *Plaintiffs-Appellants*

v.

ARKANSAS-LOUISIANA GAS COMPANY, *Defendant-Appellant*

• • • • •

Appealed from the
First Judicial District Court for the
Parish of Caddo, Louisiana
Honorable C. J. Bolin, Jr., Judge

• • • • •

WIENER, WEISS, MADISON & HOWELL
by James Fleet Howell — *Attorney for Plaintiffs-Appellants*

BLANCHARD, WALKER, O'QUIN & ROBERTS
by Robert Roberts, Jr. — *Attorneys for Defendant-Appellant*

• • • • •

Before: PRICE, MARVIN, JONES, JJ.

By Price, J.

Plaintiffs seek damages for an alleged breach of contract by defendant for failing to escalate the price of gas purchased from them in accord with a price adjustment provision contained in a long-term gas purchase contract.

Plaintiffs are either independent producers or owners of various mineral interests under numerous leases producing natural gas in the Sligo Gas Field of Bossier Parish. Defendant, Arkansas Louisiana Gas Company (Arkla) is a large integrated gas utility company, which engages in exploration, production, transmission, purchase, and sale of natural gas and its by-products. Arkla has for many years been a major purchaser of gas in the Sligo Field.

The gas purchase contract forming the basis for this litigation was executed in 1952 between Arkla and several independent producers pursuant to a lengthy renegotiation of an existing contract which had been in effect since 1937, and which would have expired in 1954. Although all of the multiple plaintiffs herein were not original parties to the 1952 contract, they have subsequently become parties subject to the agreement by amendment or by operation of law. The 1952 agreement obligated plaintiffs to sell all of the gas produced or owned by them in the Sligo Field to Arkla for a period of twenty-eight years and provided for a fixed schedule of prices per MCF to be paid for raw gas throughout the period of the contract. The agreement further contained a price adjustment provision referred to in the contract as a "Favored Nations Clause," providing:

> (D) If at any time during the term of this agreement Buyer should purchase from another party seller gas produced from the subject wells or any other well or wells located in the Sligo Gas Field at a higher price than is provided to be paid for gas delivered under this agreement, then in such event the price to be paid for gas thereafter delivered hereunder shall be increased by an amount equal to the difference between the price provisions hereof and the concurrently effective higher price provisions of such subsequent contract; provided that in determining whether a given price is in fact "higher" than the price provision of this contract, the inquiry shall not be limited to the actual prices stipu-

lated but due consideration shall also be given to a comparison of all other pertinent provisions of the two contracts, such as point of delivery, basis of measurement, taxes, dehydration, and delivery pressures (provided that the number of years stated as the terms during which the two contracts shall respectively remain in force and effect shall not be a factor to be considered for purposes of comparison under this paragraph) and the price to be thereafter payable in accordance with this paragraph for gas delivered hereunder shall be adjusted accordingly insofar as may be necessary to make allowances for any discrepancies as may exist between such comparable provisions of the two contracts. It is agreed that any such higher price for gas delivered hereunder shall be effective on the first day of Buyer's accounting month (as elsewhere herein defined) next following the effective date of such subsequent contract, all subject, however, to any rules and regulations of the Office of Price Stabilization or any other regulatory body having jurisdiction.

In February 1961 Arkla acquired, as lessee, a fifteen percent interest in an oil and gas lease granted by the United States on approximately 2,400 acres of land owned by it in the Sligo Field. Arkla participated with its co-lessees in drilling for and producing gas in substantial amounts from this leased acreage. Arkla has taken its fifteen percent share of the gas produced into its own processing plant in the Sligo Field and disposed of it through its own distribution system including transmission through an interstate pipeline. The lease from the United States stipulated a royalty to be paid by the lessees of a percentage of the oil or gas production obtained or, at the option of the United States, a payment in money by the lessees of the fair market value attributed to its percentage of production. The government has continuously elected to be paid a "value royalty," and in accord with the right reserved by it to have

the Secretary of Interior establish the reasonable minimum value of gas for computation of royalty due, the price determined and ultimately acceded to by Arkla was and has continued to be in excess of that being paid plaintiffs under the 1952 contract.

Plaintiffs brought this action in October 1974 alleging that the payment of the higher price to the United States by Arkla beginning in 1961 activated the provisions of the Favored Nations clause of the 1952 contract and obligated Arkla to increase the purchase price paid plaintiffs commensurate with the price paid the government.

Plaintiffs seek compensatory damages and an accounting from Arkla alleging that it was in bad faith in intentionally concealing from them for fourteen years that a higher price was being paid for gas to the United States.

Arkla filed appropriate responsive pleadings questioning the jurisdiction of the state court alleging that the gas purchases in question have always been subject to the provisions of the Natural Gas Act, and solely within the jurisdiction of the Federal Power Commission (FPC), which has since been superseded by the Federal Energy Regulatory Commission (FERC). Arkla's attempt to have the case removed to the Federal District Court on that basis was denied.

In answer to the original and several amended pleadings of plaintiffs, Arkla denied it had triggered the Favored Nations clause of the 1952 contract by payment of an amount for gas to the United States which exceeded that being paid plaintiffs since the payment to the United States was solely a "rental royalty" and not a purchase of gas from another "party seller" as required for activation of the price adjustment provision.

An exception of no cause of action was filed by Arkla against the claim of one of plaintiffs, W. E. Hall, Jr., on the basis that he executed an amendment to the contract

dated May 25, 1969, which deleted the benefit of the Favored Nations clause as to him. Hall through responsive pleadings contends the amendment by him was ineffective because it was executed in error as he had no knowledge at the time that Arkla had previously breached the contract by paying the higher price to the United States.

After a very lengthy trial on the merits,[1] the district court sustained the exception of no cause of action as to the claims of W. E. Hall, Jr., and dismissed his demands. The court rendered judgment for all other plaintiffs as follows:

Frank J. Hall	$135,413.44
Virgil J. Hall	36,930.88
Carlyle W. Urban, Trustee under Will of H. M. Harrell	202,954.56
John K. Harrell, Sr.	25,368.96
James E. Harrell	25,368.96
Elva L. Weiss	56,853.12
National American Bank, Executor under Will of Seymour Weiss	56,853.12
T. F. Philyaw	1,187.84
W. O. Cochran	4,644.16
D. B. McConnell	42,301.76
James A. Noe, Jr. and C. T. Munholland, Testamentary Executors under Last Wills of Mr. and Mrs. James A. Noe	153,128.96
S. G. Myers	130,215.91
Asa Benton Allen	21,530.24
Elaine Allen	20,874.88

There are several issues on appeal which can be generally categorized as follows: (1) whether the Federal Energy

[1] The pleadings and testimony consume twenty-six volumes containing 4,987 pages. There are additionally over 360 exhibits offered by plaintiff and over 80 offered by defendant.

Regulatory Commission has the sole and exclusive subject matter jurisdiction; (2) whether the Favored Nations clause was activated when defendant paid value royalty at a higher price to the United States than it paid for gas purchases to plaintiffs; (3) whether W. E. Hall, Jr., validly waived his interest in the Favored Nations clause when he signed an amended contract in 1969; and (4) whether the award of damages by the trial court was correct.

I. Jurisdiction

The threshold issue on appeal is whether the trial court had proper subject matter jurisdiction to entertain this suit. Defendant contends the trial court lacked the power and authority to determine the rate at which natural gas was or is sold in interstate commerce since the rate-making function is vested solely and exclusively in the FERC by the Natural Gas Act. Defendant further contends that the FERC has primary jurisdiction to determine the contractual issue of whether the Favored Nations clause of the 1952 contract was activated by its payment of value royalty to the United States. Neither of these contentions can be maintained. Defendant's initial argument is in error because the relief sought is not that of a rate increase, but is instead a claim for damages arising under state contract law. Although the state court must adhere to the provisions of the Natural Gas Act and the pertinent regulations of the FERC in its determination of damages, it is a proper forum for adjudication of a state contract law dispute. Furthermore, the Natural Gas Act evinces no purpose to abrogate private rate contracts. *United Gas Pipe Line Co. v. Mobile Gas Serv. Corp.*, 350 U.S. 332, 76 S.Ct. 373 (1956). The act recognizes the rights of the parties to rates established by individual contract and does not alter ordinary contractual relationships where the controversy is one of ordinary contract law. *Cities Service Gas Company v. Federal Power Commission,* 255 F.2d 860, *cert. den.* 358 U.S. 837, 79 S.Ct. 61 (1958); *Skelly Oil Co. v. Federal Power Commission,*

532 F.2d 177 (1976); *Phillips Petroleum Co. v. Federal Power Commission*, 349 F.2d 535 (1965). A claim founded on state contract law does not lose its character just because the Natural Gas Act is in some way involved. *Pan American Petro. Corp. v. Superior Court of Del.*, 366 U.S. 656, 81 S.Ct. 1303 (1961).

Defendant's contention that the FERC has primary administrative jurisdiction to decide this contract dispute is also in error. In recent years the doctrine of primary administrative jurisdiction has been refined to apply to claims involving the special competence and expertise of an administrative body. *Montana-Dakota Util. Co. v. Northwestern Pub. S. Co.*, 341 U.S. 246, 71 S.Ct. 692 (1951); *Best v. Humboldt Placer Mining Company*, 371 U.S. 334, 83 S.Ct. 379 (1963); *United States v. Western Pacific Railroad Co.*, 352 U.S. 59, 77 S.Ct. 161 (1956). State courts do have jurisdiction to determine matters of contract law not within the specific technical expertise of the FERC. *Pan American Petro Corp. v. Superior Court of Del., supra.* The major issue in the case before us is one of construing the provisions of a contract and the intentions of the parties at the time of the execution of the contract. Such a determination does not require the specific technical expertise of the FERC. Although the FERC may have original jurisdiction in this case, it does not have exclusive original jurisdiction, but rather shares concurrent original jurisdiction with the state court.

II. Activation of the Favored Nations Clause

Plaintiffs contend payments made to the United States by defendant in its dual capacity as lessee and pipe-line purchaser are tantamount to a "purchase from another party seller," as this term was intended in the price adjustment clause of their 1952 gas sales contract with defendant. Defendant contends the payments were royalty or rent being paid in its position of lessee and not a purchase because the United States had no title to any gas produced

under the lease, it having continuously elected to accept a value royalty on the gas produced.

We recognize that the theory of ownership and classification of lease royalty payments as rent as urged by defendant is in accord with the prevailing state law and federal decisions on this issue. See *Shell Petroleum Corp. v. Calcasieu Real Estate & O. Co.*, 185 La. 751, 170 So. 785 (1936); *Logan v. State Gravel Co.*, 103 So. 526 (La. 1925); *Board of Com'rs. of Caddo Levee Dist. v. Pure Oil Co.*, 167 La. 801, 120 So. 373 (La. 1929); *Melancon v. Texas Company*, 230 La. 593, 89 So. 2d 135 (1956). *Mobil Oil Corporation v. Federal Power Commission*, 463 F.2d 256 (1971), *cert. den.* 406 U.S. 976, 92 S.Ct. 2413 (1972).

We nevertheless find it inappropriate to accept the technical and restrictive interpretation on the term "purchase from another party seller" relied on by defendant under the circumstances shown in this instance.

The evidence shows that during the lengthy negotiations between defendant and the principal plaintiffs in 1952, defendant's prime objective in renegotiating the preexisting contract was to commit the plaintiffs to a long-term contract. As an inducement for a twenty-eight-year-term the officials of the defendant corporation offered to include a Favored Nations clause. The request by plaintiffs to have the clause pivot on the highest market price being paid by *anyone* in the field was rejected by defendant.

The handwritten notations made at that time by the defendant's attorney who prepared the final draft of the agreement show that his instructions from the official of defendant handling the negotiations were to prepare a price adjustment clause based on "highest price we pay for gas in the Sligo Field." Thereafter, agreement on the subject clause was reached which tied it to the highest price being paid by *defendant* in the Sligo Field.

There is no evidence suggesting the description of the contracting parties as "Buyer" and "party sellers" was in-

tended to have any restrictive legal meaning and the terms were apparently standard phrases contained in a Favored Nations clause of another contract used as a model by the attorney drafting the agreement. Indicative of the fact that little thought was given to these terms having any significant restrictive effect on the broad application of the clause is the absence of a definition of the words "Buyer" and "party seller" within the agreement. Although defendant strenuously urges that the terms "Buyer," "seller," and "purchase" as used in the Favored Nations Clause has a restrictive legal meaning and limits the applicability of the clause to "sales" of gas, defendant's actions subsequent to execution of the contract show a tendency on its part to use sales terminology in a very broad manner to also include royalty interests in the preparation of division orders and the payment of royalty to lessors from a bank account styled "Gas Purchase Account."

The general rule of contract interpretation concerning a Favored Nations clause is that "in order to give effect to the intention of the parties the Court must consider the circumstances surrounding the making of the contract, its subject, and the situation and relation of the parties at the time of its making; *and the construction placed upon the contract by the parties to it as reflected by their words and acts is entitled to great, if not controlling influence in ascertaining the parties' understanding of its terms.*" [emphasis added] *Louisiana-Nevada Transit Co. v. Woods,* 393 F. Supp. 177 (1975).

The basic purpose of a price adjustment or Favored Nations clause is to protect a seller from discrimination by the pipe-line purchaser of gas under a long-term contract. *Eastern Petroleum Company v. Kerr-McGee Corporation,* 447 F.2d 569 (1971); *Louisiana-Nevada Transit Co. v. Woods, supra.* As it is intended for the protection of the seller, the clause should be broadly construed to effectively carry out this purpose. Therefore, to exclude the substantial amounts paid to the government by defendant as having any bearing on the price being paid for gas by defendant in this field because of a technical semantic classification of the payment as being rent royalty would render the protection intended to be afforded plaintiffs by a price adjustment clause meaningless.

The factors affecting our decision on this issue are analogous to those presented in *Eastern Petroleum Company v Kerr-McGee Corporation, supra,* in which the court found a payment of royalty to the state of Arizona under a lease of public lands to activate a Favored Nations clause in a contract providing that payment for gas "shall never be less than the price paid by Buyer to other sellers of helium-bearing gas from leases or lands in the same general area." The defendant pipe-line purchaser in that case contended the payment of royalties to the state was not a "price" paid to another "seller" within the meaning of the contract as the gas was "owned" by the lessee at the time it was reduced to possession. The court found it unnecessary to decide whether the payment under the lease to the state was a purchase of gas or royalty as either classification was within the purpose and intent of the price adjustment clause of the contract before it. As we are unaware of any appellate decisions in this state concerning the interpretation of such unusual contractual provisions, we are constrained to follow the federal jurisprudence in resolving this question.

For the foregoing reasons, we conclude the trial court was correct in holding that the payment by defendant for gas produced under the lease from the United States was within the scope of the price adjustment clause of plaintiffs' contract.

III. Waiver of Favored Nations Clause By W. E. Hall, Jr.

On May 25, 1969, W. E. Hall, Jr., one of the numerous plaintiffs herein, executed an amendment to the 1952 gas purchase contract wherein he deleted his interest in the Favored Nations clause. Defendant asserts plaintiff's waiver as an affirmative defense against his claim for damages arising under the price adjustment clause. Plaintiff contends the waiver was ineffective because he executed the amendment under an error of fact induced by defendant's misrepresentations and concealment of the true facts causing him to believe the price adjustment clause had not been activated. Plaintiff contends he would not have deleted the clause had he known of the higher prices being paid by Arkla to the government. However, plaintiff's testimony reveals that in 1969 Hall had an interest in a well under contract to Texas Gas Producing Company with gas produced therefrom being sold to the latter. At that time the well had nearly depleted, and the pressures were dropping. In order to keep from having to cap the well, Hall contacted defendant who agreed to take over the well and use its pipe lines wherein the pressures would be lower, thus allowing the well to keep producing. In order to contract with defendant, plaintiff had to execute an amendment deleting the Favored Nations clause to comply with the FPC's more recent regulations prohibiting the inclusion of such a clause in a gas purchase contract. By using defendant's pipe lines, Hall was able to sell the gas without having to compress it. He testified that the main reason for executing the contract was to keep selling the gas without having to buy and operate a compressor to compress the gas.

The Louisiana Civil Code articles dealing with error of fact (C.C. Arts. 1820-1845) provide that a contract will not be considered invalid unless there was error as to the "principal cause," or "motive," for making the contract. C.C. Art. 1825. In this case the principal motive for W. E. Hall, Jr.'s signing the contract was to continue selling gas without the expense and time of having to purchase and operate a compressor. Therefore, as correctly found by the trial court, there was no legal error of fact upon which this plaintiff can rely to vitiate the waiver.

IV. Damages

The first issue presented in determining the correctness of the award made to plaintiffs is the effect the "filed rate doctrine" of the Natural Gas Act has on the rights of plaintiffs to recover damages. Sections 4(c) and 4(d) of the act require a seller of natural gas to file a proposed rate increase with the FPC for its approval before such an increase can be effective. The only rate schedule ever filed by plaintiffs with the FPC in this instance was the original gas purchase contract in 1952. The FPC regulations, § 157.50(c), provide an exception to the foregoing rule in regard to a "small producer" as defined in the regulation, who has obtained a certificate from the commission exempting him from having to file a rate schedule as long as the increase in rate does not exceed the ceiling rate set by the commission. Several of the plaintiffs obtained certificates as small producers in October 1972, and the certificates issued to those parties were made effective to all plaintiffs in this action by the order of the FPC.

The trial court found that the plaintiffs were precluded by the Natural Gas Act from recovering damages, which are measured by a standard related indirectly to a retroactive price increase, except for the period subsequent to the issuance of the small producer certificates in October 1972. This holding is in accord with the jurisprudence construing the effect of this statute. *Interstate Natural Gas Co., Inc. v. Mississippi River Fuel Corporation,* 220 La. 43, 55 So. 2d 775 (1951); *Ashland Oil & Refining Co. v. Federal Power Commission,* 421 F.2d 17 (1970); *Socony Mobile Oil Co. v. Brooklyn Union Gas Co.,* 299 F.2d 692 (1962).

Although plaintiffs claim quantum based on an amount commensurate with the difference between the price they received and that which they would have received had they been granted a price increase in 1962, they contend their suit is for damages and not for a retroactive price increase, and is therefore not affected by the Natural Gas Act.

Plaintiffs' alternative theory of recovery is that they should recover for damages caused by the fraudulent concealment by defendant of the fact it was paying a higher price to the United States for gas which prevented them from timely filing for a change in rate schedule with the FPC.

Neither of these positions is tenable. The action for damages to be successful necessarily assumes a price increase would have been granted by the FPC. That such approval would have been granted by the commission is highly speculative and cannot serve as a basis for an award of damages. See *Interstate Natural Gas Co. v. Southern Cal. Gas Co.*, 102 F. Supp. 685 (1952).

The trial court did not make a finding that defendant was guilty of fraudulent concealment, and we find the evidence is insufficient to support such an allegation.

The evidence shows that in the fall of 1961 several of the officials of defendant were concerned that the royalty price negotiated with the United States might have the effect of activating the price adjustment clause of plaintiffs' contract. The question was submitted to defendant's attorneys who advised that payment of royalty would not have this legal effect. Defendant did not make any disclosure to plaintiffs at that time or subsequently which would have allowed plaintiffs the opportunity to seek a determination before an appropriate tribunal. In early 1974 when inquiries were made by plaintiffs, the officials of Arkla were uncooperative and evasive in answer to questions concerning the possible purchase of gas from the United States. Although

this failure to inform and later evasiveness on the part of defendant was not commendable, it nevertheless does not prove fraudulent concealment. A party alleging fraud has the burden of establishing it by more than a mere preponderance of the evidence. The conclusive proof required must be by clear and convincing legal evidence. *Placid Oil Co. v. Taylor*, 345 So. 2d 254 (La. App. 3rd Cir. 1977); *Capital Bank & Trust Co. v. Core*, 343 So. 2d 284 (La. App. 1st Cir. 1977); and *Jackson v. Fontenot Building Inc.*, 314 So. 2d 516 (La. App. 1st Cir. 1975). For these reasons plaintiffs cannot be awarded damages bearing any relationship to an increase in gas prices for the period prior to October 1972.

Defendant primarily complains on appeal of the admissibility and probative value of the plaintiffs' evidence to sustain any award of damages. The evidence relied on by plaintiffs to prove their damages for breach of contract was the testimony of Frank J. Hall, a plaintiff having substantial gas holdings in Sligo that are subject to the contract. The evidence shows Hall to be a knowledgeable oil and gas operator with many years of experience in the exploration for, production, and sale of natural gas. Hall gathered all of the pertinent data necessary to calculate the damages to which plaintiffs claim they are entitled for the entire period from September 1961 through December 1975. Based on the data obtained, Hall, with the assistance of his accountant who is also a plaintiff in this suit, prepared schedules to reflect a comparison in the price being paid by Arkla to plaintiffs with that being paid to the United States for each year during this fourteen-year period. Under the instructions and supervision of Hall, the accountant further prepared summaries which related the differential in the price of gas to the volumes sold by plaintiffs to defendant for the period. Built into these summaries are the adjusting factors which Hall considered necessary to render the prices comparable. The summaries were further extended

to calculate and show the accrual of the legal rate of interest on the sums claimed during the period.

Defendant attacks the admissibility of the above described evidence contending that the schedules and summaries were made from information that has not been offered in evidence. There is a well recognized rule that summaries of voluminous material or documents may be introduced in evidence provided the opposing party has equal access to the material from which the summaries were prepared. Wigmore, "Evidence," (1972) Vol. IV., § 1230, at page 535, *Northern Pac. Ry. Co. v. Keyes*, 91 F. 47 (1898); *Sam Macri & Sons, Inc. v. U.S.A.*, 313 F.2d 119 (1963); *Midcontinent Broadcasting Company v. North Central Airlines, Inc.*, 471 F.2d 357 (1973). In the instant case defendant was in the superior position and had full access to all data on which Hall relied. A substantial part of the information gathered by Hall was from records of defendant's accounting department which were inspected under discovery procedure. Hall utilized division orders prepared by defendant to determine percentages of ownership in each drilling unit over the period in question. To establish production quantities of raw gas and liquid hydrocarbons, he relied partially on records in his own office and on information obtained from the State Department of Conservation. Defendant had equal access to all such data. Although there are others who would have better qualifications because of specialized training to make such an analysis, Hall has exhibited a sufficient familiarity with the underlying principles of gas pricing and methods of accounting to allow the admissibility into evidence of his testimony and the summaries prepared under his supervision for whatever weight they may have.

Defendant also attacks the weight to be given the calculations made by Hall and his accountant as it contends they are self-serving. While this evidence is to some extent self-serving, this reason alone is not sufficient to reject it in the

absence of any rebuttal evidence showing that the evidence as a whole was unreliable and not prepared with any degree of objectivity.

Defendant questions the acceptance of the summaries also on the basis that Hall has calculated plaintiffs' damages by a determination of the difference between gas prices paid to the United States and the plaintiffs and by assuming the plaintiffs' contract was revised to provide for processing of raw gas at defendant's plant and payment of the entire value of extracted liquids to them and assuming that all condensate was processed by defendant free of charge and the proceeds paid to them. Defendant contends these adjustments made by Hall are improper and give plaintiffs advantages which were never intended by the "pertinent factors" adjustments provided in the Favored Nations clause of the contract. The comparability provisions of the Favored Nations clause of this agreement provides:

> . . . provided that in determining whether a given price is in fact "higher" than the price provisions of this contract, the inquiry shall not be limited to the actual prices stipulated but due consideration shall also be given to a comparison of all other pertinent provisions of the two contracts, such as point of delivery, basis of measurement, taxes, dehydration, and delivery pressures (provided that the number of years stated as the terms during which the two contracts shall respectively remain in force and effect shall not be a factor to be considered for purposes of comparison under this paragraph) and the price to be thereafter payable in accordance with this paragraph for gas delivered hereunder shall be adjusted accordingly insofar as may be necessary to make allowances for any discrepancies as may exist between such comparable provisions of the two contracts.

A literal reading of this provision requires the interpretation that all pertinent factors necessary to properly

equate the price of gas shall be given consideration and those specified are illustrative only. The only factor to be excluded is the length of the contract term. We find the adjustments made by Hall in the summaries were within the purview of this provision.

Plaintiffs also calculated two other items of compensatory damages claimed by all or some of the plaintiffs. The first relates to losses occurring because of income tax advantages which would have inured to all plaintiffs under depletion allowances had they received the increases in price during the years they were due rather than in a lump amount under a court award. The second refers to losses to several of the plaintiffs who contend they would have drilled an additional well in the field had they been advised timely by defendant of the facts which would have enabled them to have obtained a price increase in 1961. Both the damages for loss of the depletion allowance and the loss arising from the lack of knowledge concerning the increased gas prices are consequential damages which cannot be recoverable for the breach of an obligation to pay money. La. C.C. Art. 1935.

Defendant next complains that the method of the trial court in arriving at the award of damages was erroneous. The trial court accepted the summaries prepared by Hall as competent evidence on which to award damages, but was confronted with the problem that the summaries were prepared for the total period from September 1961 through December 1975. In order to limit plaintiffs' award for the period of October 1972 through December 1975, the court reduced the total damages reflected by Hall's summary by a percentage of sixty-eight percent.

Defendant contends this method is erroneous as it gives no consideration to the differences in the actual volumes of gas produced and sold in the period for which damages are allowed and assumes that they have remained constant over the entire period since 1961. Further, defendant shows

Hall's summary contains a calculation of interest for the entire period of fourteen years, and therefore, the method used by the court allows recovery of interest on sums not recoverable. Defendant also illustrates that the procedure followed by the court does not compensate each plaintiff equally for the volume of gas sold by him during the allowable period.

We recognize that during the presentation of evidence on damages, the trial court suggested to the parties on several occasions the possibility of an appointment of an expert to assist the court in this very complex matter. As this suggestion was not pursued, the court had no means at hand to accurately reduce the summaries in evidence to the period for which plaintiffs were entitled to damages, and therefore, resorted to the percentage of allocation utilized. Plaintiffs are only entitled to damages representing a difference between the price paid by the defendant to the United States and the price paid to them, after applying the adjustments for pertinent factors, for the period from October 1, 1972, through December 31, 1975. They are additionally entitled to interest at the legal rate of seven percent on the increased amount owed to them as it accrued each month during this period. La. C.C. Arts. 1938 and 2553(3).

We must agree that the method used by the trial court does not achieve this result. These calculations cannot correctly and accurately be made by this court from the record before us. Under La. C.C.P. Art. 2164 this court may render any judgment which is just, legal, and proper, including the power to remand for a new trial in the interest of justice. See *Guilott v. Guilott*, 326 So. 2d 551 (La. App. 3rd Cir. 1976).

While we are reluctant to protract this litigation, we find it necessary to remand the case in the interest of justice to both parties for the limited purpose of a recalculation of

the damages and the interest to be allowed each plaintiff in accord with the views expressed herein.

The district court may in its discretion appoint an expert in the field of oil and gas accounting to perform the necessary calculations based insofar as possible on the evidence already in the record in this matter. The court may take whatever additional evidence that is found necessary to calculate damages in accord with these views.

For the foregoing reasons, the judgment is set aside, and the case is remanded for a new trial restricted to the assessment of damages. Costs of this appeal are assessed equally to plaintiffs and defendant. Assessment of all other costs shall await final determination of this cause.

APPENDIX C

COURT OF APPEAL
SECOND CIRCUIT
STATE OF LOUISIANA

Office of the Clerk, Shreveport, Louisiana. June 6, 1978

As counsel of record in the captioned case, you are hereby notified that the application or applications for rehearing filed by Plaintiffs-Appellants and Defendant-Appellant have this day been En Banc. Denied.

FRANK J. HALL, et al

versus

ARKANSAS LOUISIANA GAS CO.

Docket No. 13,549

Sincerely,
HAROLD L. BOOTH
Clerk of Court

APPENDIX D

SUPREME COURT OF LOUISIANA
NEW ORLEANS, 70112

September 22, 1978

FRANK J. HALL, ET AL

VS.

ARKANSAS-LOUISIANA GAS COMPANY

No. 62,580

In re: Arkansas Louisiana Gas Company, applying for Certiorari, or Writ of Review, to the Court of Appeal, Second Circuit, Parish of Caddo.

Writ denied.

PFC
FWS
ATJR
JAD
WFM
JLD

SANDERS, C.J., would grant this application, so that it can be considered along with No. 62,560, which has been granted.

A TRUE COPY
Clerk's Office
Supreme Court of Louisiana
New Orleans
September 22, 1978

/s/ FRANS J. LA BRANCHE, JR.
Clerk

APPENDIX E

SUPREME COURT OF LOUISIANA
NEW ORLEANS, 70112

September 22, 1978

FRANK J. HALL, ET AL

V.

ARKANSAS LOUISIANA GAS COMPANY

No. 62,560

In re: Frank J. Hall, et al applying for Certiorari, or writ of review, to the Court of Appeal, Second Circuit, Parish of Caddo

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Writ granted.

PFC
JWS
ATJR
JAD
WFM
JLD

A TRUE COPY
Clerk's Office
Supreme Court of Louisiana
New Orleans

September 22, 1978

/s/ FRANS J. LA BRANCHE, JR.
Clerk of Court

APPENDIX F

FIRST JUDICIAL DISTRICT COURT
CADDO PARISH, LOUISIANA
NUMBER 225,699

FRANK J. HALL et al

v.

ARKANSAS LOUISIANA GAS COMPANY

Opinion

The plaintiffs in this case are the owners of mineral leases located within the Sligo Field, Bossier Parish, Louisiana, and they have sold all of their gas production from said leases to the defendant, Arkansas Louisiana Gas Company, since about 1939. Defendant took the gas into its pipeline and into its processing plant and the residue gas was delivered into its pipeline distribution system.

After extended negotiations a new gas sales contract between the parties was executed (see Exhibit P-1) which was dated January 11, 1952, under the terms of which plaintiffs agreed to sell their gas production from their said leases located in the Sligo Field for a period of twenty-eight years for a stated price of $0.08547 per MCF of gas (thousand cubic feet) at a pressure base of 15.025 p.s.i.a., and the defendant, Arkansas Louisiana Gas Company agreed to purchase the gas for said amount and in addition included a "Favored Nations Clause" worded as follows:

Section 8(D)

"(D) *If at any time during the term of this agreement Buyer should purchase from another party seller gas produced from the subject wells or any other well or wells located in the Sligo Gas Field at a higher price than is provided to be paid for gas delivered*

under this agreement, then in such event the price to be paid for gas thereafter delivered hereunder shall be increased by an amount equal to the difference between the price provisions hereof and the concurrently effective higher price provisions of such subsequent contract; provided that in determining whether a given price is in fact 'higher' than the price provisions of this contract, the inquiry shall not be limited to the actual prices stipulated but due consideration shall also be given to a comparison of all other pertinent provisions of the two contracts, such as point of delivery, basis of measurement, taxes, dehydration, and delivery pressures (provided that the number of years stated as the terms during which the two contracts shall respectively remain in force and effect shall not be a factor to be considered for purposes of comparison under this paragraph) and the price to be thereafter payable in accordance with this paragraph for gas delivered hereunder shall be adjusted accordingly insofar as may be necessary to make allowances for any discrepancies as may exist between such comparable provisions of the two contracts. It is agreed that *any such higher price* for gas delivered hereunder shall be effective on the first day of Buyer's accounting month (as elsewhere herein defined) next following the effective date of such subsequent contract, all subject, however, to any rules and regulations of the Office of Price Stabilization or any other regulatory body having jurisdiction." (Emphasis supplied)

In February of 1961, the defendant, Arkansas Louisiana Gas Company, as lessee, acquired a 15% interest in a mineral lease granted by the United States on its lands in the Sligo Field. (Exhibit P-45). In accordance with the requirements of the lease, the defendant and its co-owners drilled a number of producing wells on the property. The defendant did not sell its 15% of the gas produced under the lease but took it into its pipeline and into its processing

plant where the liquefiable hydrocarbons were extracted and the residue gas was delivered into its pipeline distribution system.

The oil and gas lease from the United States provided, in part, for the rights of the lessee in Section 1:

> "SECTION 1. Rights of Lessee.—That the lessor, in consideration of rents and royalties to be paid, and the conditions and covenants to be observed as herein set forth, does hereby grant and lease to the lessee the exclusive right and privilege to drill for, mine, extract, remove, *and dispose of all the oil and gas deposits owned by the lessor* except helium gas in or under the following-described tracts of land situated in the Barksdale Air Force Base East Reservation, Bossier Parish, Louisiana:—." (Emphasis supplied)

The lessee was to pay royalty to the United States as set forth in Section 2(d)(2):

> "2. To pay the lessor a royalty of 16⅔ per cent of the amount or *value* of production obtained and saved from the leased land. Also, to pay an additional royalty of 8⅓ per cent of the value of production until there has been paid as such additional royalty an amount equivalent to $500 an acre for the total number of acres contained in this lease at time of issuance, such number being that cited in Section 1 hereof. In computing such royalty on gasoline or other products extracted from gas or on gas remaining after extraction of such products, no allowance will be made for the cost of gathering, boosting, transportation, extraction, or processing." (Emphasis supplied)

The lease further provided that the lessor, the United States, had the option of receiving its royalties in "value" or in amount of production as provided by Section 2(d)(4):

> "(4) *At the option of the lessor to pay the respective royalties herein provided for in value or in amount of production.* If paid in value such royalties shall be due and payable monthly on the last day of the calendar month next following the calendar month in which produced. If paid in amount of production the respective royalty products shall be delivered in merchantable condition on the premises where produced without cost to lessor, unless otherwise agreed to by the parties hereto, at such times and at such shipping point as may be designated by the lessor, or in the case of crude oil, in such tanks provided by the lessee as reasonably as may be required by the lessor, but in no event shall the lessee be required to hold royalty oil or other royalty products in storage beyond the last day of the calendar month next following the calendar month in which produced. The lessee shall not be responsible or held liable for the loss or destruction of royalty oil or other products in storage from causes over which it has no control. (Emphasis supplied)

The lessor, the United States, elected to receive its royalties in value. Section 2(d)(5) provided as follows:

> "(5) *It is expressly agreed that the Secretary of the Interior may establish reasonable minimum values for purposes of computing royalty* on any or all oil, gas, natural gasoline, and other products obtained from gas; *due consideration being given* to the highest price paid for a part or for a majority of production of like quality in the same field, *to the price received by the lessee,* to posted prices and to other relevant matters and, whenever appropriate, after notice and opportunity to be heard." (Emphasis supplied)

Beginning in 1962, defendants began to pay the United States Government under the above provision of the con-

tract sums of money based upon a fraction of all gas produced on the lease with the price of gas fixed as $0.117432 per MCF until January 1, 1962, $0.130252 until January 1, 1967, and thereafter $0.140508 at a pressure base of 15.025 p.s.i.a. (Exhibit P-82). At the time these payments began in 1962, the plaintiffs were receiving $0.08797 per MCF.

The principal question in this case is whether or not the payments of money under the above quoted provisions of this contract had the effect of increasing prices under the gas sales contract of plaintiffs as set forth in the Favored Nations provision of said contract, Section 8(D).

Plaintiffs contend that the payments to the United States Government by the defendant under the terms of its lease (Exhibit P-45), but in its position as pipeline purchaser, amounted to a "Purchase from another party seller" within the meaning of plaintiffs' contract with the defendant, Section 8(D), while defendant, in effect, contends that the payments were only a payment of royalty by defendant in its position as lessee and not a purchase of gas, because the United States Government, the lessor, had no title to any gas under the terms of the contract and the amount of gas and the price assigned thereto were only to be used as a measure in figuring that "money" or "value" royalty or rent.

Louisiana has adopted the "non-ownership" theory of oil and gas, that is, that the oil and gas beneath the surface of the ground is not subject to ownership by anyone until it has reached the surface. After a long development the usual oil and gas lease has been held to provide for ownership of the *oil* produced by the lessee and lessor at the time it reaches the wellhead in the proportions set forth in the lease. The lessor is granted the option to receive his royalty as a share of the *oil* production in kind or to be delivered to the pipeline company by the lessee to the credit of the lessor. In the usual situation the lessor sells *his oil* to the pipeline company and is paid therefor by the pipeline

company although it is the lessee that actually delivers the *oil* to the pipeline for the lessor's account.

At the time the oil and gas industry in Louisiana was in its formative stages, there was less demand for natural *gas* and it was less marketable. Mineral leases often granted the lessor the same option to receive his royalty on *gas* just as was done in the case of royalty on *oil*.

The usual more recent mineral lease in use in Louisiana often makes a different provision for royalty on *gas* and only provides for the lessor to receive a fraction of the *amount* received from the *sale* of the *gas*, or a fraction of the fair value of the *gas* if the gas is used by the lessee. Regardless of whether it is oil or gas that is produced, it is usually all sold to the pipeline company at the same price and both lessee and lessor are paid their fractional part of the proceeds of the sale based on the same price rate. Ordinarily a raise in the royalty payment was accomplished by increasing the fractional part of the production due to the royalty owner, rather than a raise in the price of his share of the production.

The plaintiffs in this case have cited authorities for the proposition that such wording of a lease as to *gas* that provides for a "money" royalty or value royalty only authorizes the sale of the lessor's share of the *gas* production to the pipeline purchaser by the lessee for the lessor's account. Plaintiffs then conclude that the lessor does customarily sell *gas* to the pipeline company. On the other hand defendant has presented authorities and citations, both State and Federal, to the contrary. The cases referred to often cite the exact wording of the lease involved.

At this point is becomes important to examine the exact wording of this lease. The lease from the United States Government (Exhibit P-45) treats the royalty due to the lessor on oil and gas in principally the same fashion. It

does not differentiate between *royalty on gas* as opposed to *royalty on oil*. See the emphasized portions of the lease by the United States (Exhibit P-45), Sections 2(d)(2), 2(d)(4) and 2(d)(5). In other words the lease contemplates that the legal title to oil and gas would be the same at the time it reaches the wellhead.

The same Exhibit P-45 in speaking of the rights of lessee in Section 1 thereof as previously quoted herein states that the lessee is granted "—the exclusive right and privilege to drill for, mine, extract, remove, *and dispose of all the oil and gas deposits owned by the lessor*—". (Emphasis supplied).

Because it is well-established that in Louisiana the landowner does not own "deposits" of oil and gas in the ground, but that oil and gas is only subject to ownership when it is produced at the wellhead, it would be impossible for the lessee to "dispose" of *oil* and *gas* deposits "owned" by the lessor until they are produced at the wellhead, but at that point it is possible for the lessee to "dispose" of the production including the share of the *oil* and *gas* production "owned" by the lessor.

Although the words used in the form of the lease (Exhibit P-45) do not seem to be designed for use in a state such as Louisiana that subscribes to the "non-ownership" theory of oil and gas they are consistent with the Louisiana theory if given the above construction. In other words, the lessee is authorized to sell the lessor's share of the *oil* and *gas* production to the pipeline purchaser for the lessor's account.

Defendant argues that the decisions of the Federal Courts have held that no sale of *oil* and *gas* is involved on the part of the United States as lessor in such an instance; otherwise, the Federal Power Commission would be required to exercise jurisdiction of the sale of *gas* produced in interstate commerce, which it does not. Also, if the transaction by the United States, as lessor, amounted to a

sale of *gas* or *oil*, the United States would be required to exercise the option of taking its production in kind and would not be able to dispose of it except by public bid and sale under the applicable Federal statute. In my opinion the answer to these contentions and the testimony of the opinion of the Federal experts is the simple fact that this Court is dealing with the construction of a Louisiana contract under Louisiana law and not the construing of the lease for the purpose of a Federal statute or statutes as were the cases and opinions cited by the defendant. Although inconsistent with the Federal decisions, the inconsistency does not conflict with the Federal statutes to the extent that both cannot co-exist.

Because of the contradiction of legal authority on the technical question of whether a lessor has title of gas to sell there is an ambiguity in the use of the words "—purchase from another party seller—" as used in the contract between plaintiffs and defendant, Exhibit P-1, which cannot be gleaned from the other portions of the contract. For this reason other evidence is admissible to discover the true intention of the parties.

The defendant in this case customarily listed the lessor as a "seller" on its required division orders and required their signatures thereto. Essentially the same form was used by the defendant whether the product produced was oil, gas or condensate. Defendant argues that Section 11 of the contract provided that the plaintiffs would be paid for 8/8th of the gas and would be responsible for paying the royalty and that this provision demonstrates that the intention of the parties was that a lessor was not contemplated as a "seller"; however, the plaintiff points out that this same Section 11 goes on to grant the plaintiffs the option to require the defendant to pay the royalty and in such case the plaintiffs were obligated to furnish signed division orders to the defendant on forms provided by

the defendant and that these forms, in fact, listed the royalty owners as "sellers".

By citing the above facts, it is not my intention that this case be decided on the wording in a division order, but only to demonstrate that the evidence shows the word "seller" to have a broader usage and more general meaning than the more restricted definition plaintiff now asserts.

Defendant next argues that the United States under the lease, Exhibit P-45, was not furnished with any division order nor required to sign a division order and that this fact illustrates that the United States Government, as lessor, was not regarded as a "seller". On the other hand the evidence in this case shows that the United States does not sign a division order, but relies on the lease contract, so that the failure of the defendant to require a division order signed by the United States cannot be relied on to demonstrate the intention of the parties to P-45.

The gas purchase contract in this case between plaintiffs and defendant (Exhibit P-1) was drafted after a long negotiating process. Section 8(d) was the subject of give and take negotiations, each party giving on one point in order to gain another. The only things that this Court can conclude from the evidence of these negotiations is that Section 8(d) was not to be restricted in its application to just other formal "gas purchasing contracts" executed by buyer with other sellers of gas produced in the Sligo Field, but would apply to such a "purchase" of such gas from another party seller by means other than a formal full-fledged gas purchase contract, such as an *oral* contract. See testimony of Mr. Hetherwick, Tr. Vol. 20, p. 74, line 6 to 30. The fact that it was intended to apply to even *oral* contracts evidences an intent that it should have a broad application. It was intended to apply to gas from "any" wells located in the Sligo Gas Field purchased by defendant. In addition the intent of Section 8(d) was to protect plaintiffs against

a rise in the purchase price of gas that might be paid by defendant within the Sligo Field during the long 28-year term of the contract by cutting across some of the traditional lines usually associated with such contracts.

Defendant's principal argument is that in making payment to the United States under its lease, Exhibit P-45, that it was paying royalty as lessee, *not* purchasing gas as pipeline purchaser. On the contrary, defendant was acting in a dual capacity at one and the same time. It was paying royalty as lessee *and* purchasing gas as pipeline purchaser within the meaning and intent of Section 8(d).

For all of the above reasons it is the opinion of this Court that the acceptance of gas produced from the mineral lease executed by the United States, Exhibit P-45, by the defendant as a pipeline operator and payment therefor to the United States constituted a purchase of gas from another party seller within the meaning of the contract of plaintiff, Exhibit P-1.

The defendant next argues that the contract between plaintiff and defendant, Exhibit P-1, is not comparable with the lease from the United States to the defendant, Exhibit P-45. As previously stated, the intention of the parties in the execution of Exhibit P-1 was that Section 8(d) would be broader than just applying to the purchase of gas through a formal gas purchase contract but it was intended to also apply to such things as an *oral* contract, which, in fact, evidences the intent of the parties that the coverage would be extremely broad, because it would neither contemplate that an oral contract would include all the many provisions contained in the full-fledged gas purchase contract, nor necessarily contemplate that the gas purchased be shipped in interstate commerce, since the Federal Power Commission does not recognize an oral contract for the sale and purchase of gas.

The defendant argues that the drilling obligation contained in the lease, Exhibit P-45, provides an item that

makes the two contracts incapable of comparison, but the list of items in Section 8(d) is not an exclusive listing of either pertinent factors of comparison or non-pertinent factors of comparison. It appears to the Court that since Section 8(d) specifically states that the length of the term of the contract shall not be a factor to be considered for comparison of the two contracts that the drilling obligation contained in the lease, Exhibit P-45, would be of the same type of factor and should not be considered for purposes of comparison.

As one would imagine the day-to-day administration and accounting involved in a gas purchase contract is extremely complicated. The defendant is in the business of administering these contracts and the head of its accounting department, Mr. W. W. McLeod, testified that it would be possible to compare the price of gas received by plaintiff under Exhibit P-1 and the price received by the United States under Exhibit P-45, and to compute all the pertinent factors in making the comparison and that it could have been done over the years had he been so instructed at the time. See testimony of Mr. McLeod, Vol. 10, pages 83 to 85, and Vol. 12, page 17.

The defendant in this case has made no comparison between the two prices, it having taken the position throughout that the two are not capable of comparison; however, it is my opinion that the evidence shows that the two are capable of comparison. The best information was or is in the possession of the defendant, although the sheer of volume of the documents to be considered (estimated by defendant at one time as a literal box-car load) and the length of time that has elapsed since most of them were used presents a very difficult picture as to if all are still in existence. The Court is required to act on the best information produced before it. Absolute certainty is not required.

Defendant next contends that one plaintiff, W. E. Hall, Jr., executed a contract on May 25, 1969, deleting the Favored Nations Clause from the 1952 contract for which reason he has no claim against the defendant under Section 8(d) thereof. It is my opinion that the defendant's contentions in this regard are correct and should be sustained. He executed the contract, Exhibit P-285, which deleted the Favored Nations Clause in order to be able to sell gas from a well to the defendant in order to avoid having to operate a compressor for the gas. There was no error as to the principal cause of the contract, Exhibit P-285, nor has he restored or offered to restore the benefit he received under the contract as is a pre-requisite under the Civil Code Articles 1819 and 1882.

Defendant relies on several defenses that arise from the provisions of the Natural Gas Act. The first contention is that plaintiffs cannot recover a raise in prices because plaintiff never obtained approval of the higher rate or price from the Federal Power Commission as required under the Natural Gas Act, 15 U.S.C.A. 717 et seq., adopted by Act of Congress on June 21, 1938. Defendants have cited the case of *Interstate Natural Gas Co. Inc., et al v. Mississippi River Fuel Corporation,* 55 So.2d 755; 220 La. 43, decided by the Supreme Court of the State of Louisiana in 1951. The holding of that case is that the plaintiffs, having failed to apply to the Federal Power Commission to put the increase rate into effect, cannot recover such damages from the defendant.

The plaintiffs point out that the Federal Power Commission, by general rules, has established a system which permits independent producers to obtain from the Commission a "Small Producers Certificate" which authorizes them from the effective date of such certificate to collect increased rates provided by their contract within the limits of the Commission Area Rate orders. Four of the plaintiffs herein, Frank J. Hall, Virgil J. Hall, James A. Noe

and S. G. Myers received Small Producers Certificates effective October, 1972, and would be eligible for the increased rate provided by their contract within the limits of the Commission's Area Rate orders. The remainder of the plaintiffs herein, other than Mr. W. E. Hall, Jr., above referred to, are entitled to the benefit of a Small Producers Certificate under the applicable statutes and would likewise be entitled to collect increased rates provided by their contract within the limits of the Commission's Area Rate orders. See Federal Power Commission Order No. 607 and 607-a. The evidence demonstrates that the prices paid to the United States per MCF of gas was below the maximum area rate established in these orders, which means that the area rate schedule would not actually impose any limit under the facts of this case after October, 1972, but would prevent recovery before that date.

Defendant has pled prescription of one, three and ten years. The facts of this case are that the lease from the United States, Exhibit P-45, was not even of record in Caddo Parish, Louisiana, nor was the information available giving the prices being used to compute the Government's royalty payment until plaintiffs were able to obtain the information about June 26, 1974. Suit was filed July 18, 1974.

Prescription does not run against one who is ignorant of the existence of facts that would entitle him to bring a suit, when such ignorance is not willful and does not result from negligence. Plaintiffs were not advised of the facts in this case until they succeeded in obtaining a letter dated June 25, 1974, from Mr. F. L. Stelzer which included the lease from the United States, Exhibit P-45, and the letter of establishing the price set by the Government, Exhibit P-65, and the letter in which defendant acceded thereto, Exhibit P-82. Under this state of facts prescription does not run against plaintiffs and defendant's plea of prescription is to no avail.

One of the plaintiffs herein, Frank J. Hall, was qualified as an expert in the oil and gas business, having drilled and produced wells for many years. He, or others under his direction, has prepared contracts, bought and sold gas and oil, mineral leases, royalty, minerals, managed properties, and dispersed and paid royalties on gas production. I find that he has sufficient expertise because of his experience to permit the introduction of his calculations or those made under his supervision and direction. The objection goes to the weight of the evidence and not to its admissibility.

Mr. Hall with the help of persons working at his direction prepared a calculation of the difference in prices between the two contracts in dispute here after consideration of all the pertinent factors. He then considered the volumes of gas purchased from plaintiffs and the fractional part attributable to each plaintiff's share. This calculation is the best evidence that the Court has before it and appears to be reasonable. This calculation, however, was based upon the entire period of the claim back from 1961, to December 31, 1975; whereas, the effective date of the Small Producers Certificates began in October, 1972. It is the opinion of this Court that, considering the differences in prices each year and the share attributable to each plaintiff that his itemization of the total damage due each plaintiff, except W. E. Hall, Jr., should be reduced by 68% to correctly reflect the deletion of plaintiffs' claims before October, 1972; damages for loss of depletion allowance; damages for failure to drill Section 17, and to recognize the difference in the comparisons involving raw condensate, wet gas, extracted products, manufactured products and combinations of each.

Defendant has made no claim that the fractional division of ownership between plaintiffs is in error, that the division is contrary to the records in its own division order department, or that there is any adverse claim of title against any of the interests of plaintiffs. Under the terms of its own

division orders defendant cannot equitably refuse to pay the additional sums, there being no reason to fear that the defendant would have to pay said sums to some one else.

Let there be judgment against the defendant in favor of plaintiffs in the following amounts, plus costs and interest from January 1, 1976:

Frank J. Hall	—	$135,413.44
Virgil J. Hall, widow	—	36,930.88
Carlyle W. Urban, Trustee under will of H. M. Harrell	—	202,954.56
John K. Harrell, Sr.	—	25,368.96
James E. Harrell	—	25,368.96
Elva L. Weiss, widow	—	56,853.12
National American Bank, Executor under Will of Seymour Weiss	—	56,853.12
T. F. Philyaw	—	1,187.84
W. O. Cochran	—	4,644.16
D. B. McConnell	—	42,301.76
S. G. Myers	—	41,668.80
James A. Noe	—	153,128.96
Asa Benton Allen	—	21,530.24
Elaine Allen	—	20,874.88

Let there be further judgment in favor of defendant, Arkansas Louisiana Gas Company, rejecting the demands of plaintiff, W. E. Hall, Jr., at his costs.

October 14th, 1977.

/s/ C. J. Bolin, Jr.
C. J. Bolin, Jr.
District Judge

APPENDIX G

FIRST JUDICIAL DISTRICT COURT
CADDO PARISH, LOUISIANA
Number 225,699

FRANK J. HALL, ET AL

v.

ARKANSAS LOUISIANA GAS COMPANY

Opinion on Defendant's Motion for New Trial Limited To Reargument and Supplement To Motion for New Trial and Opinion on Plaintiffs' Motion for New Trial Limited To A Rehearing and Motion for Modification of Judgment

The defendant in its motion and supplemental motion for a new trial strenuously argues that it did not breach Section 8(d) of the contract with plaintiffs.

After carefully considering the arguments made, it is still my opinion that insofar as 8(d) is concerned the effect is (and should be) the same regardless of whether P-45 was executed by the United States as lessor or had been executed by a private party as lessor; that P-45 gave the lessor, the United States, the right to exercise every incident of ownership of its royalty and when it elected to be paid in value it had the unusual right to fix the value of the production upon which its royalty payments were calculated, all of which rights are consistent with ownership of the royalty by the lessor and a purchase of gas by defendant-pipeline operator; that this Court is dealing with the construction of the Louisiana law, Section 8(d) of Exhibit P-1, which was intended to have a broad application, to apply to gas from "any" wells located in the Sligo Gas Field purchased by defendant, and with the purpose of protecting plaintiffs against a rise in the purchase price of gas that might be paid by defendant within the Sligo Field during the long twenty-eight year term of the con-

tract by cutting across some of the traditional lines usually associated with such contracts; the lease from the United States, Exhibit P-45, is to be construed in the light of such intent and purposes and, insofar as Section 8(d), in accordance with Louisiana law.

Defendant relies on the case of *Wallis v. Pan American Petroleum Corporation,* 384 U.S. 63; 16 L.Ed 2d 368; 86 Sup.Ct. 1301, but that case specifically held that the federal common law does not govern the dealings of private parties in an oil and gas lease validly issued by the United States under the Mineral Leasing Act of 1920, and that the decision of the case would depend upon state law. The court refused to extend the application of federal law beyond the initial grant of the lease therein involved and even refused the argument "that federal law retains its initial hold on the lease until existing equities are resolved." Cases cited in that decision which did extend federal law to govern the outstanding equities existing at the time of an original grant of land were distinguished and "explained by a specific federal interest found in conflict with local law." Other cases were distinguished where there was *no* specific federal interest, because there was *no conflict with* local law. See 16 L.Ed 2d 369, at page 375. In the instant case there is also *no* specific federal interest in the construction of the contract between plaintiff and defendant and Section 8(d) thereof and, as stated in this Court's previous opinion, there *is a conflict with local law.*

The defendant here has relied on the case of *Miree v. United States,* 538 F. 2d 643, in arguing that federal law should control in the construction of the lease from the United States, P-45, insofar as its effect on Section 8(d). The facts of that case were that DeKalb County, Georgia, entered into an agreement with the Federal Aviation Administration whereby in return for a grant of money by that agency DeKalb County gave the FAA certain assurances, among which were its promises that it would operate its airport for the use and benefit of the public, maintain it in a safe and serviceable condition, and limit use of adjacent land so that it would not interfere with the safe use of the airport. Thereafter, a jet aircraft crashed after ingesting birds swarming over the airport and feeding on the adjacent county garbage dump. The persons injured and representatives of the persons thus killed filed suit against DeKalb County as *third-party beneficiaries under the county's agreement under the FAA*. The United States Court of Appeals, Fifth Circuit, held in an en banc decision held that the Federal Common Law would apply, not the law of Georgia. Five judges of the court joined in a dissenting opinion.

The dissent in the above cited case sets forth principles and authorities which apply to the facts of the instant case. The facts of the instant case are at least two steps removed from those in the above cited case: (1) because plaintiffs here are not suing as third-party beneficiaries of the agreement with the United States, but are seeking to enforce an entirely Louisiana contract and provision 8(d) thereof. (2) the Federal Government is not a party to this suit and should have no particular interest in the outcome of this lawsuit. The interest of the Federal Government in the construction of Exhibit P-1 and Section 8(d) thereof is too remote to require the application of federal law, but the State of Louisiana has an interest in construing this Louisiana contract and Section 8(d) thereof in the same fashion regardless of whether the triggering mechanism be a purchase of gas from a private individual or the United States.

Defendant likewise relies on the case of *Murphy Corporation* v. *Fontenot,* 225 La. 379; 73 So.2d 180, for the proposition that the Supreme Court of the State of Louisiana has held that "the fugitive oil and gas when captured did not belong to the Federal Government but to private owners". The case did not involve an attempt to collect severance tax on the entire 8/8ths of the production from the

lease, but only that 6/8ths portion belonging to the lessees. The opinion states on Page 182 "protective measures from the drainage were sought and secured by the Government's selling exploratory rights to private purchasers and lessees who became the *owners of all* the severed minerals when they were captured, *except a 2/8th royalty* paid the U.S. Government." At Page 183 the opinion used the following language "—and the Government retained 2/8ths royalty rights in the oil and gas produced—". Actually the opinion did not address the question of the legal title of the 2/8ths production, but if so then the opinion excepts the "2/8ths royalty paid the U. S. Government" and seems contrary to defendant's contentions.

The plaintiffs in their motion contend that the case of *Interstate National Gas Company, Inc., et al v. Mississippi River Fuel Corporation,* 220 La. 43; 55 So.2d 775, was not the authority for the proposition cited by the Court in this case. The decision of the Louisiana Supreme Court there construed a gas purchase contract, the question being whether or not the contract and the amendment thereto resulted in a debt which accrued before 1938, the date the National Gas Act went into effect, or whether or not the result was a price increase that was to go into effect in 1944. The Court found that it was not an accrued debt, but rather a part of a price increase and plaintiffs had failed to apply to the Federal Power Commission as required by the National Gas Act (and even though the parties had contracted therefor), plaintiff was denied recovery. For this reason the decision does have an application to the facts of this case.

Plaintiffs also contend that the decision of this Court is contrary to that of other state judges and the federal court in this case in recognizing a defense under the National Gas Act, but my understanding of those decisions is that those courts looked to see whether or not plaintiff stated a cause of action and permitted the case to go to trial. De-

fenses based upon the National Gas Act, which are affirmative defenses, were to be pled and proved by the defense, as was done in this case.

Plaintiffs properly point out that one plaintiff, S. G. Myers, did not acquire his interest in the properties until December 1, 1972, and would not be subject to the reduction of 68% imposed by the Court. For this reason it is my opinion that Mr. Myers is entitled to his total damages of $130,215.91, but all other damages were properly calculated and are to remain the same.

The motion for new trial and supplemental motion for new trial filed by defendant is denied.

The plaintiffs' motion for new trial limited to a re-hearing and motion for modification of judgment is granted limited to re-argument and, the re-argument having been had, let there be judgment in favor of plaintiffs and against defendant all as previously granted, except that the amount of damages awarded to Sidney G. Myers is fixed at $130,215.91, instead of the amount originally stated.

December 2nd, 1977.

/s/ C. J. Bolin, Jr.
C. J. Bolin, Jr.
District Judge

APPENDIX H

FIRST JUDICIAL DISTRICT COURT
CADDO PARISH, LOUISIANA

NUMBER 225,699

FRANK J. HALL, ET AL

VERSUS

ARKANSAS LOUISIANA GAS COMPANY

Judgment

This case having come on regularly for trial on its legal merits on September 27, 1976, and the trial of said case having been concluded on January 14, 1977; and the case having been submitted for decision on June 20, 1977, after the completion of oral arguments and the filing of written briefs, the Court having found the law and the evidence to be in favor thereof and for reasons assigned in written Opinions dated October 14, 1977 and December 2, 1977, which have been filed in the record herein;

IT IS ORDERED, ADJUDGED AND DECREED that there be judgment herein in favor of the following Plaintiffs against the Defendant, ARKANSAS LOUISIANA GAS COMPANY, awarding to said Plaintiffs the sums as hereinafter set forth, to wit:

FRANK J. HALL	—	$135,413.44
VIRGIL J. HALL, widow	—	36,930.88
CARLYLE W. URBAN, Trustee under Will of H. M. HARRELL	—	202,954.56
JOHN K. HARRELL, SR.	—	25,368.96
JAMES E. HARRELL	—	25,368.96
ELVA L. WEISS, widow	—	56,853.12

NATIONAL AMERICAN BANK, Executor under Will of SEYMOUR WEISS	—	56,853.12
T. F. PHILYAW	—	1,187.84
W. O. COCHRAN	—	4,644.16
D. B. MCCONNELL	—	42,301.76
JAMES A. NOE, JR. and C. T. MUNHOLLAND, Testamentary Executors under Last Wills of Mr. and Mrs. JAMES A. NOE	—	153,128.96
S. G. MYERS	—	130,215.91
ASA BENTON ALLEN	—	21,530.24
ELAINE ALLEN	—	20,874.88

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the above and foregoing Plaintiffs are awarded legal interest on the above and foregoing sums from January 1, 1976, until paid and for all costs of this proceeding.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that there be judgment in favor of the Defendant, ARKANSAS LOUISIANA GAS COMPANY, rejecting the demands of the Plaintiff, W. E. HALL, JR., at his cost.

JUDGMENT RENDERED herein by virtue of written Opinions dated October 14, 1977 and December 2, 1977, respectively, which are filed in the record of this proceeding.

JUDGMENT READ AND SIGNED on December 5, 1977, at Shreveport, Louisiana.

/s/ C. J. BOLIN, JR.
C. J. Bolin, Jr.
District Judge

APPENDIX I

FIRST JUDICIAL DISTRICT COURT
CADDO PARISH, LOUISIANA

NUMBER 225,699

FRANK J. HALL, ET AL

VERSUS

ARKANSAS LOUISIANA GAS COMPANY

Opinion

For decision is defendant's exception to the jurisdiction of this Court. The plaintiffs seek damages for defendant's alleged breach of contract. Plaintiffs contend that in 1961 defendant began buying Sligo Field gas from the United States government at a price higher than was being paid to plaintiffs for their gas under the 1952 contract entered into between defendant and plaintiffs or plaintiffs' predecessors in title. Plaintiffs contend that this activated the Favored Nations clause of the contract, Section (D), which would require defendant to pay to plaintiffs a price equal to the highest price paid the government. Defendant contends that this Court does not have jurisdiction.

This Court clearly has jurisdiction under the United States Supreme Court decision in *Pan-American Petroleum Corporation vs. Superior Court of Delaware,* 81 S. Ct. 1303 (1961). There the Court held that claims arising under state law, in that case a claim sued in contract or quasi-contract, were a proper subject for a state court to exercise jurisdiction. The Court further stated that this jurisdiction was not abrogated by the Natural Gas Act. Defendant's declinatory exception is without merit and is therefore overruled.

This Court has carefully read the briefs which able counsel for plaintiffs and defendant have filed, as well as the supplemental letters and attachments. We mention this for

the purpose of making it clear to counsel that we have considered all points which have been raised, since the briefs filed by counsel will not be part of the record which will be considered by an appellate court.

July 30, 1975.

/s/ JAMES E. CLARK
Judge

APPENDIX J

NATURAL GAS ACT

United States Code, Title 15

§ 717c. Rates and Charges: Schedules: Suspension of New Rates

(a) All rates and charges made, demanded, or received by any natural-gas company for or in connection with the transportation or sale of natural gas subject to the jurisdiction of the Commission, and all rules and regulations affecting or pertaining to such rates or charges, shall be just and reasonable, and any such rate or charge that is not just and reasonable is declared to be unlawful.

(b) No natural-gas company shall, with respect to any transportation or sale of natural gas subject to the jurisdiction of the Commission, (1) make or grant any undue preference or advantage to any person or subject any person to any undue prejudice or disadvantage, or (2) maintain any unreasonable difference in rates, charges, service, facilities, or in any other respect, either as between localities or as between classes of service.

(c) Under such rules and regulations as the Commission may prescribe, every natural-gas company shall file with the Commission, within such time (not less than sixty days from June 21, 1938) and in such form as the Commission may designate, and shall keep open in convenient form and place for public inspection, schedules showing all rates and charges for any transportation or sale subject to the jurisdiction of the Commission, and the classifications, practices, and regulations affecting such rates and charges, together with all contracts which in any manner affect or relate to such rates, charges, classifications and services.

(d) Unless the Commission otherwise orders, no change shall be made by any natural-gas company in any such rate, charge, classification or service, or in any rule, regulation or contract relating thereto, except after thirty days' notice to the Commission and to the public. Such notice shall be

given by filing with the Commission and keeping open for public inspection new schedules stating plainly the change or changes to be made in the schedule or schedules then in force and the time when the change or changes will go into effect. The Commission, for good cause shown, may allow changes to take effect without requiring the thirty days' notice herein provided for by an order specifying the changes so to be made and the time when they shall take effect and the manner in which they shall be filed and published.

(e) Whenever any such new schedule is filed the Commission shall have authority, either upon complaint of any State, municipality, State commission or gas distributing company, or upon its own initiative without complaint, at once, and if it so orders, without answer or formal pleading by the natural-gas company, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such rate, charge, classification, or service; and, pending such hearing and the decision thereon, the Commission, upon filing with such schedules and delivering to the natural-gas company affected thereby a statement in writing of its reasons for such suspension, may suspend the operation of such schedule and defer the use of such rate, charge, classification, or service, but not for a longer period than five months beyond the time when it would otherwise go into effect; and after full hearings, either completed before or after the rate, charge, classification, or service goes into effect, the Commission may make such orders with reference thereto as would be proper in a proceeding initiated after it had become effective. If the proceeding has not been concluded and an order made at the expiration of the suspension period, on motion of the natural-gas company making the filing, the proposed change of rate, charge, classification, or service shall go into effect. Where increased rates or charges are thus made effective, the Commission may, by order, require the natural-gas company to furnish a bond, to be approved by the Commission, to refund any

amounts ordered by the Commission, to keep accurate accounts in detail of all amounts received by reason of such increase, specifying by whom and in whose behalf such amounts were paid, and, upon completion of the hearing and decision, to order such natural-gas company to refund, with interest, the portion of such increased rates or charges by its decision found not justified. At any hearing involving a rate or charge sought to be increased, the burden of proof to show that the increased rate or charge is just and reasonable shall be upon the natural-gas company, and the Commission shall give to the hearing and decision of such questions preference over other questions pending before it and decide the same as speedily as possible.

June 21, 1938, c. 556, § 4, 52 Stat. 822; May 21, 1962, Pub.L. 87-454, 76 Stat. 72.

§ 717d. Fixing Rates and Charges: Determination of Cost of Production or Transportation

(a) Whenever the Commission, after a hearing had upon its own motion or upon complaint of any State, municipality, State commission, or gas distributing company, shall find that any rate, charge, or classification demanded, observed, charged, or collected by any natural-gas company in connection with any transportation or sale of natural gas, subject to the jurisdiction of the Commission, or that any rule, regulation, practice, or contract affecting such rate, charge, or classification is unjust, unreasonable, unduly discriminatory, or preferential, the Commission shall determine the just and reasonable rate, charge, classification, rule, regulation, practice, or contract to be thereafter observed and in force, and shall fix the same by order: *Provided, however,* That the Commission shall have no power to order any increase in any rate contained in the currently effective schedule of such natural gas company on file with the Commission, unless such increase is in accordance with a new schedule filed by such natural gas company; but the Commission may order a decrease where existing rates are

unjust, unduly discriminatory, preferential, otherwise unlawful, or are not the lowest reasonable rates.

(b) The Commission upon its own motion, or upon the request of any State commission, whenever it can do so without prejudice to the efficient and proper conduct of its affairs, may investigate and determine the cost of the production or transportation of natural gas by a natural-gas company in cases where the Commission has no authority to establish a rate governing the transportation or sale of such natural gas.

June 21, 1938, c. 556, § 5, 52 Stat. 823.

APPENDIX K

Federal Power Commission Regulations Under The Natural Gas Act, Code of Federal Regulations, Title 18

§ 154.92 Filing of Rate Schedules By Independent Producer.

(a) Every independent producer who on or since June 7, 1954, has engaged in the interstate transportation or sale of natural gas subject to the jurisdiction of the Commission shall on or before December 1, 1954, filed with the Commission rate schedules, as defined in § 154.93, setting forth the terms and conditions of service and all rates and charges for such transportation or sale effective on June 7, 1954. To each such rate schedule there shall be attached a statement showing actual billing for a recent month in sufficient detail to show how the billing amount is determined.

(b) Every independent producer who subsequent to the effective date of this part, proposes to initiate an interstate transportation or sale of natural gas subject to the jurisdiction of the Commission to an existing or new customer shall file with the Commission not less than 30 days nor more than 90 days prior to the date such transportation or sale is proposed to be initiated a rate schedule as defined in § 154.93, setting forth the terms and conditions of service and all rates and charges for such transportation or sale. To each such rate schedule there shall be attached a statement showing estimated sales and billing for the first month of service, in sufficient detail to show method of billing and prices used. The statement shall also give the proposed date of commencement of service. A complete copy of all material shall be furnished to each purchaser under the rate schedule. With each such filing there shall be submitted a list of parties to whom such material has been mailed.

(c) Every independent producer who transports or sells less than 100,000 Mcf annually of natural gas subject to the jurisdiction of the Commission may, in lieu of the requirements of paragraphs (a) and (b) of this section file a state-

chaser, and (4) the geographical location (field, county, and State) at which delivery is made.

(d)(1) Every independent producer seeking authority to render natural gas service previously authorized by the Commission, as successor in interest in all the properties or other rights covered by a particular rate schedule, shall file three copies of the instrument of assignment whereby the assignee acquired the properties (or rights therein) involved, along with a request that the assignor's rate schedule be redesignated as the rate schedule of the assignee. He shall also file three copies of an informational summary, in the form prescribed in § 250.8 of this chapter, for each contract of sale or transportation of gas involved in the assignment.

(2) Where the authority being sought under subparagraph (1) of this paragraph relates only to an assigned portion of the rights covered by the rate schedule of the assignor, the assignee shall file, as his rate schedule, three copies of the assignor's basic contract of sale, as amended, and of the instrument of assignment together with the informational summary required by subparagraph (1) of this paragraph.

(3) If the rate schedule of the assignor relating to the rights assigned is in effect subject to refund or if the sale is being made by the assignor under temporary authorization subject to a rate refund condition, authority to render service will be granted to the assignee only upon condition that he file assurance by way of bond or undertaking that he will refund, at such times and in such amounts to such persons as the Commission may find to be entitled thereto any portion of the rate which had been permitted to become effective pursuant to § 154.102 or the rate condition in the assignor's temporary authorization as may be found by the Commission not to be justified. Assignee's obligation to refund, in the absence of his voluntary assumption of some greater proportion of assignor's liability, shall attach as of

the effective date of the Commission's order granting the assignee a certificate or temporary certificate as the base may be unless otherwise ordered or provided.

(e) Any jurisdictional natural gas company that maintains a rate schedule on file with the Commission or makes application to have a rate schedule approved by this Commission or modifies any existing or proposed rate schedule must, in addition to the requirements of this or any other section, complete and submit Form No. 108, or applicable schedules thereof, pursuant to the direction of § 260.6 of this chapter.

[Order 174-B, 19 F.R. 8808, Dec. 23, 1954, as amended by Order 278, 29 F.R. 3699, Mar. 25, 1964; Order 556, 41 F.R. 52443, Nov. 30, 1976]

§ 154.93 Rate Schedule Defined.

For the purpose of §§ 154.92 through 154.101 "rate schedule" shall mean the basic contract and all supplements or agreements amendatory thereof, effective and applicable on and after June 7, 1954, showing the service to be provided and the rates and charges, terms, conditions, classifications, practices, rules and regulations affecting or relating to such rates or charges, applicable to the transportation of natural gas in interstate commerce or the sale of natural gas in interstate commerce for resale subject to the jurisdiction of the Commission: *Provided,* That in contracts executed on or after April 3, 1961, for the sale or transportation of natural gas subject to the jurisdiction of the Commission, any provision for a change of price other than the following provisions shall be inoperative and of no effect at law; the permissible provisions for a change in price are:

(a) Provisions that change a price in order to reimburse the seller for all or any part of the changes in production, severance, or gathering taxes levied upon the seller;

(b) Provisions that change a price to a specific amount at a definite date;

(b-1) Provisions that permit a change in price to the applicable just and reasonable area ceiling rate which has been, or which may be, prescribed by the Commission for the quality of the gas involved; and

(c) Provisions that, once in five-year contract periods during which there is no provision for a change in price to a specific amount (paragraph (b) of this section), change a price at a definite date by a price-redetermination based upon and not higher than a producer rate or producer rates which are subject to the jurisdiction of the Commission, are not in issue in suspension or certificate proceedings, and, are in the area of the price in question: *Provided further,* That any contract executed on or after April 2, 1962, containing price-changing provisions other than the permissible provisions set forth in the proviso next above shall be rejected.

[Order 174-B, 19 F.R. 8807, Dec. 23, 1954; as amended by Order 232, 26 F.R. 1983, Mar. 8, 1961; Order 232-A, 26 F.R. 2850, Apr. 6, 1961; 242 27 F.R. 1356, Feb. 14, 1962; Order 329, 31 F.R. 15485, Dec. 8, 1966]

§ 154.94 Changes In Rate Schedules.

(a) No change shall be made in any rate, charge, or service in effect on and after June 7, 1954, for the interstate transportation or sale of natural gas in interstate commerce subject to the jurisdiction of the Commission by any independent producer required to file rate schedules pursuant to § 154.92, without first filing a change in rates pursuant to section 4(d) of the Natural Gas Act and in accordance with this section.

(b) Every change in any rate schedule, rate, charge, classification or service effective or applicable to a sale

subject to the jurisdiction of the Commission as of June 7, 1954, and on file with the Commission, or required to be filed pursuant to § 154.92, or in any rate schedule, rate, charge, classification or service effective or applicable to a sale subject to the jurisdiction of the Commission initiated subsequent to June 7, 1954, on file with the Commission, or required to be filed with the Commission pursuant to § 154.92 shall be filed with the Commission in triplicate not less than 30 days nor more than 90 days prior to the date such change in rate schedule is proposed to be made effective.

(c) The operation of any provision of the rate schedule providing for future or periodic changes in the rate, charge, classification, or service after June 7, 1954, or the operation of any like provision in any initial rate schedule filed after June 7, 1954, shall constitute a change in rate schedule.

(d) Any change in any rate schedule, rate, charge, classification, or service provided in a rate schedule in effect on June 7, 1954, which by the terms of said rate schedule is to be operative after June 7, 1954 and prior to September 15, 1954, may be filed on less than thirty days' prior notice, subject nevertheless to the right of the Commission to suspend any such proposed change, if the Commission in any case shall, within thirty days after the date of filing, find it necessary to suspend such proposed change. If any such proposed change is suspended, the suspension period will begin with the designated effective date of such change.

(e) With each change in rate schedule not constituting a change in rate level by any means there shall be submitted reasons, nature and basis for the proposed change and the date upon which the change is proposed to be made effective. Changes in service such as compression, dehydration, etc., by either seller or buyer shall be considered as a change in the existing rate level.

(f) *Notice of change in rate level.* (1) An independent producer who has sold in interstate commerce 5,000,000 Mcf of gas or less annually in each year of his operations during the preceding five years and who is proposing a contractual change in rates, charges, etc., shall file the information called for in the following form:

NOTICE OF INDEPENDENT PRODUCER RATE CHANGE FILING

1. Producer

.....

(Name)

.....

(Address)

2. Buyer

.....

(Name)

3. Location of sale ..

.....

(Field) (County) (State)

4. (a) FPC gas rate schedule No. .....

(b) Basic contract date .....

5. (a) Type of increase

.....

(Periodic, favored-nation, renegotiated, etc.)

(b) Contract basis

.....

(Specify Contract Provision)

(c)

.....

(Proposed Effective Date)

6. Rates in cents per Mcf at ..... psia:
(Specify)

(a) Present effective rate:

Base rate	*Tax Reimbursement*
.....	.....
Other [1] *(specify separately)*	*Total rate*
.....	.....

(b) Proposed rate:

Base rate	*Tax Reimbursement*
.....	.....
Other [1] *(specify separately)*	*Total rate*
.....	.....

7. Statement of estimated sales volume and comparative revenues for the twelve-month period succeeding the proposed effective date (shown with volume and rates at the same psia as in Item 6):

Estimated volume (Mcf)	*Revenues at present effective rate*
.....	.....
Revenues at proposed rate	*Difference in revenues*
.....	.....

8. Average Btu content per cubic foot of the gas sold during the last twelve-month period .....; estimated for the succeeding twelve-month period .....

(Date) (Signed)

....

(Title)

.....

[1] Dehydration, compression, Btu adjustment, etc.

(2) An independent producer who has sold in interstate commerce more than 5,000,000 Mcf of gas annually in any year during the preceding five years and who is proposing a contractual change in rate level to a price below or equal to the applicable area price level for increased rates as set out in the Statements of General Policy No. 61-1, as amended (§ 2.56 of this chapter), shall file the information required in subparagraph (1) of this paragraph and may, at his option, submit a statement in support of the proposed change but shall, in any event, submit additional information in explanation of any pertinent circumstance not specifically required by the form.

(3) An independent producer who has sold in interstate commerce more than 5,000,000 Mcf of gas annually in any year during the preceding five years and is proposing a contractual change in rate level to a price higher than the applicable area price level for increased rates set out in the Statement of General Policy No. 61-1, as amended (§ 2.56 of this chapter), and any independent producer (regardless of the quantity of annual sales) proposing an ex parte or unilateral rate change shall file, in addition to the information required by subparagraph (1) of this paragraph, a full statement in support of the proposed change in rate.

(g) A complete copy of all material filed pursuant to this section shall be furnished to each party to the rate schedule. With each such filing there shall be submitted to the Commission a list of the parties to whom such material has been furnished.

[Order 174-B, 19 F.R. 8807, Dec. 23, 1954; as amended by Order 202, 23 F.R. 3715, May 29, 1958; Order 217, 24 F.R. 9469, Nov. 25, 1959; Order 240, 27 F.R. 252, Jan. 10, 1962]

§ 154.95 Oral Agreements.

If any rate schedule or change in a rate schedule is not in writing, its terms shall be reduced to writing and filed with the Commission. If the parties are not able to agree to the precise terms within a reasonable time, the applicant shall file, in triplicate, a statement of his understanding of the agreement, serving a copy thereof on the other parties to the agreement. Such other parties, in the latter event, may subsequently file, in triplicate, their understanding of the agreement.

[Order 174-B, 19 F.R. 8809, Dec. 23, 1954, as amended by Order 202, 23 F.R. 3716, May 29, 1958]

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§ 157.40 Exemption of Small Producers From Certain Filing Requirements.

(a) *Definitions.* (1) A "Small Producer" is an independent producer of natural gas as defined in § 154.91 of this chapter, who is not affiliated with a natural gas pipeline company and whose total jurisdiction sales on a nationwide basis, together with such sales of "affiliated producers" are not in excess of 10,000,000 Mcf at 14.65 p.s.i.a during any calendar year. As used in this section, the term "jurisdictional sales" includes volumes of gas paid for but not taken under prepayment clauses or otherwise, and volumes of gas sold under other independent producer rate schedules in the proportion that the independent producers seeking to come within this section has an interest in such sales, but does not include sales made pursuant to percentage sales contracts.

(2) "Affiliated producers" are persons who, directly or indirectly, control, or are controlled by, or are under common control with, the applicant producer. Such control exists if the producer has the power to direct or cause the direction of, or as a matter of acual practice does direct, the

management and policies of another producer, whether such power is exercised alone or through one or more intermediary companies, or pursuant to an agreement, and whether such power or practice is established through a majority or minority ownership or voting of securities, common directors, officers or stockholders, voting trusts, holding trusts, associated companies, relationship of blood or marriage, or any other direct or indirect means. For the further purposes of this section, the term "agreement" shall not include any agreement for the operation of a natural gas producing property or a plant processing natural gas or any joint venture, partnership, nominee, or other type of agreement pertaining to the joint exploration for and development and operation of oil and gas properties, unless such agreement otherwise establishes the power of one producer to direct or cause the direction of the management and policy of another producer. Also, for the further purposes of this section, the existence of one or more directors of an applicant producer in common with another producer shall be deemed a conclusive presumption of affiliation and control.

(3) "Small producer sales" are (i) sales by a small producer of his own interests under his own contracts; (ii) sales of all interests under a small producer's contract if producers not qualifying as small producers have interests which in the aggregate are no greater than 12½ percent; and (iii) sales of a small producer's interests under another producer's contract.

(b) *Procedure for securing blanket small producer certificate.* (1) Small producers may apply for a blanket certificate to cover all existing and all future jurisdictional sales that do not raise the producer's total jurisdictional sales on a nationwide basis above 10,000,000 Mcf during any calendar year. Applications by these producers shall include the following information: (i) Total jurisdictional sales on a nationwide basis for the year preceding the ap-

plication; (ii) a list of outstanding certificates and rate schedules together with names and percentage of interest of other interest owners under such rate schedules; (iii) a list of outstanding rate schedules of others in which applicant owns an interest together with applicant's percentage of interest; and (iv) the names of all owners (stockholders, partners, joint venturers, etc.) of the applicant with an interest of 10 percent or more, their percentage of ownership in the applicant and in any other natural gas company, and any positions such owners may hold with another natural gas company.

(2) An applicant for a blanket certificate who has no outstanding certificate issued by, or rate schedule filed with, this Commission for the sale of natural gas shall include the following information in his application:

(i) A list of all contracts to sell natural gas in interstate commerce.

(ii) Source of production, total rate and the annual volume delivery obligations of the producer under each such contract, together with names and percentage of interest of other interest owners under each such contract, and

(iii) A list of owners of the applicant with an interest of 10 percent or more, their percentage of ownership in the applicant and in any other natural gas company and any position such owners may hold with another natural gas company.

(3) The application shall contain the information required by the form set out in § 250.10 of this chapter. A conformed copy shall be served upon each of the applicant's purchasers.

(c) *Rate and certificate regulation under blanket certificate.* Small producers certificated hereunder shall be authorized to make small producer sales pursuant to existing and future contracts at the following rate levels:

(1) All sales of natural gas by small producers for resale in interstate commerce made in accordance with, and under the provisions of Opinion Nos. 699, et seq., shall be made at a maximum base rate of 130 percent of the applicable base ceiling rate established by the Commission in Opinion No. 699, et seq.

(2) All sales of natural gas by small producers for resale in interstate commerce made in accordance with, and under the provisions of Opinion Nos. 749, et seq., shall be made at a maximum base rate of 35.0¢ per Mcf except as provided for below:

(i) For gas produced in the Permian Basin Area, as defined by Opinion Nos. 662 and 662-A, and sold pursuant to contracts dated on or after October 1, 1968, small producers shall be entitled to collect a maximum base rate of 40.5¢ per Mcf.

(ii) For gas produced in the Rocky Mountain Area, as defined in Section 154.109(b) of the Commission's Regulations and Opinion No. 699, et seq., small producers shall be entitled to collect a maximum base rate of 40.5¢ per Mcf. The above rates are subject to any adjustments permitted or required under the particular order of general applicability involved. Such rate may be charged and received by the small producer and paid by the purchaser, as the lawful, just and reasonable rate approved by the Commission pursuant to sections 4, 5, and 7 of the Act. However, no small producer shall be relieved from compliance with section 7(b) of the Natural Gas Act with respect to any small producer sale regulated hereunder. Rate regulation as prescribed herein shall not apply to any jurisdictional sales made by a small producer where the gas reserves relating thereto were acquired by the purchase of developed reserves in place from a large producer. Nothing done hereunder shall be recognized by the Commission as triggering any escalation clause in an existing contract involving a pro-

ducer not covered by a small producer certificate, except as provided in paragraph (f) of this section.

(3) All sales of natural gas by small producers for resale in interstate commerce that qualify for the base ceiling rate of 93 cents per Mcf set in Opinion No. 770-A shall be made at a maximum rate of 130% of that ceiling rate.

(4) All sales of natural gas by small producers for resale in interstate commerce that qualify for the base ceiling rate of $1.42 per Mcf set in Opinion No. 770 shall be made at that ceiling rate.

(d) *Duration of the exemption.* The exemption authorized hereunder shall remain in effect for each small producer until the Commission on its own motion or on application terminates such certificate because the producer no longer qualifies as a small producer or fails to comply with the terms of the exemption. Upon such termination the producer will be required to file separate certificate applications and individual rate schedules for future sales but the exemption will still be effective as to those made under contracts dated prior to such termination.

(e) [Reserved]

(f) *Filings by large producers with respect to related resales.* A large producer may file for the price specified in its related contract for the resale of any natural gas sold to it by a small producer pursuant to the exemption authorized hereunder. In determining whether to accept or suspend such a filing, we shall be guided by the rate level sought and the size of the differential between the purchase and resale price. A large producer under an area rate clause in its resale contract may file for the rate paid by it for gas purchased from a small producer as long as the rate does not exceed the just and reasonable rate prescribed in paragraph (c) of this section.

(g) *Filing of contracts and notification of abandonment.* Pipeline purchasers and large producer purchasers shall

file, within 60 days of the execution thereof, each new contract and each contract amendment dated on or after March 18, 1971, for the sale of natural gas to them by a small producer pursuant to the exemption authorized hereunder, together with an estimate of the purchase volumes and the rate to be charged for the first full year after the commencement of deliveries with respect to each new contract and each contract amendment dedicating additional natural gas, and shall notify this Commission of the cessation of deliveries made by a small producer pursuant to the exemption authorized hereunder within 60 days of such cessation.

(h) *Resale authorization for large producer.* A large producer who has filed on or after July 15, 1971, an application for a certificate of public convenience and necessity for the resale of natural gas purchased from a small producer authorized to sell such gas pursuant to the blanket certificate provisions in paragraph (c) of this section may resell such gas at any time after the filing of its certificate application pending final Commission action thereon. Any amounts collected by a large producer for resales made pursuant to this paragraph in excess of the rate finally determined to be required by the public convenience and necessity for such resales shall be subject to refund with interest at 7 percent per annum.

[Order 428, 36 F.R. 5601, Mar. 25, 1971, as amended by Order 428B, 36 F.R. 13384, July 21, 1971; Order 428-C, 37 F.R. 7591, Apr. 18, 1972; Order 428-E, 39 F.R. 26631, July 22, 1974; Opinion No. 742, 40 F.R. 41772, Sept. 9, 1975; Order 553, 41 F.R. 32213, Aug. 2, 1976; Order 553-A, 41 F.R. 40100, Sept. 17, 1976; 41 F.R. 50242, Nov. 15, 1976; 41 F.R. 56792, Dec. 30, 1976]

Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-986

ARKANSAS LOUISIANA GAS COMPANY, *Petitioner,*

v.

FRANK J. HALL, MRS. W. E. HALL, SR., THE H. M. HARRELL TESTAMENTARY TRUST, JAMES E. HARRELL, JOHN K. HARRELL, SR., ASA BENTON ALLEN, SIDNEY G. MYERS, JR., W. O. COCHRAN, THOMAS F. PHILYAW, MRS. ELAINE ALLEN, JAMES A. NOE, D. B. MCCONNELL, MRS. EVA L. WEISS, SOL KAPLAN and NATIONAL AMERICAN BANK, New Orleans, Co-Testamentary Executors of the SUCCESSION of SEYMOUR WEISS, *Respondents.*

SUPPLEMENTAL BRIEF OF PETITIONER ADDRESSING DECISION OF LOUISIANA SUPREME COURT

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FRANK J. HALL, MRS. W. E. HALL, SR., THE H. M. HARRELL TESTAMENTARY TRUST, JAMES E. HARRELL, JOHN K. HARRELL, SR., ASA BENTON ALLEN, SIDNEY G. MYERS, JR., W. O. COCHRAN, THOMAS F. PHILYAW, MRS. ELAINE ALLEN, JAMES A. NOE, D. B. MCCONNELL, MRS. EVA L. WEISS, SOL KAPLAN and NATIONAL AMERICAN BANK, New Orleans, Co-Testamentary Executors of the SUCCESSION of SEYMOUR WEISS, *Respondents.*

SUPPLEMENTAL BRIEF OF PETITIONER ADDRESSING DECISION OF LOUISIANA SUPREME COURT

Pursuant to Rule 24 of the Supreme Court Rules, Petitioner, Arkansas Louisiana Gas Company, hereby files a supplemental brief addressing the recent decision of the Supreme Court of Louisiana in the case of *Frank J. Hall, et al.* v. *Arkansas Louisiana Gas Company,* —— So.2d —— (La.S.Ct., No. 62,560, March 5, 1979). While the decision of the Supreme Court of Louisiana involves other issues than those raised in Petitioner's application for writ of certiorari, it is

necessary and appropriate that the decision be lodged with this Court. First, the decision rendered by the Supreme Court of Louisiana occurs in the same case as is the subject of Petitioner's application for writ of certiorari. Second, the decision confirms and emphasizes Petitioner's showing in its petition for a writ of certiorari that the Louisiana courts erred in failing to refer to the Federal Power Commission [1] certain matters involving the primary and exclusive jurisdiction of that Commission under the *Natural Gas Act,* 15 U.S.C. § 717, et seq.

A copy of the decision of the Supreme Court of Louisiana is attached hereto. (App. p. 66a).

I. BACKGROUND OF THE CASE AND THE DECISION OF THE LOUISIANA SUPREME COURT

On December 18, 1978, Petitioner filed its petition for a writ of certiorari to review the judgment and decree of the Court of Appeal, Second Circuit, State of Louisiana. The judgment of the Court of Appeal was entered on May 1, 1978. Rehearing was denied on June 6, 1978, and by order entered September 22, 1978, the Supreme Court of Louisiana denied Petitioner's application for review of the Court of Appeal's judgment (App. p. 22a). Respondents also applied to the Supreme Court of Louisiana for review of the Court of Appeal's judgment. Respondents' application was granted by separate order of the Louisiana Supreme Court entered on September 22, 1978 (App. p. 23a).

[1] The Federal Power Commission was succeeded on October 1, 1977, by the Federal Energy Regulatory Commission during the pendency of this litigation. Petitioner's reference hereinafter to "Commission" shall refer either to the Federal Power Commission or the Federal Energy Regulatory Commission depending on the time frame.

Since the time that the petition for writ of certiorari and briefs were filed herein, the Louisiana Supreme Court entered on March 5, 1979 an opinion and decree as to the issues raised by Respondents before that court. Petitioner is currently seeking rehearing of the decision of the Louisiana Supreme Court.

The decision of the Louisiana Supreme Court amended the judgment entered by the Louisiana Court of Appeal, Second Circuit by awarding higher rates to Respondents for the period of time Respondents had not complied with the applicable filing requirements of the *Natural Gas Act* and the Commission's Regulations which were a prerequisite to the right to collect the higher rates. The Court of Appeal had previously determined that Respondents could not collect higher rates during this period of time that they were subject to the rate increase filing requirements of Section 4(d) of the *Natural Gas Act,* 15 U.S.C. § 717c(d) (App. pp. 13a, 48a). The period of time involved was that period before several of the Respondents became small producers in October of 1972.[2] The Louisiana Supreme Court determined that Respondents were prevented by Arkla from fulfilling the rate increase filing requirements of the *Natural Gas Act* because Respondents were not informed that Petitioner had made market value royalty payments to the United States government, which royalties were calculated on the basis of a

[2] The issue as to which of the Respondents qualified for and became "small producers" in October of 1972 is currently pending in proceedings before the Commission. See Petition for writ of certiorari, p. 8, n.3. "Small producers" are exempt from the rate increase filing requirements of the *Natural Gas Act* (App. p. 60a).

value higher than the prices paid by Petitioner to Respondents (App. p. 75a).[3] The court held that in these circumstances, Respondents were excused from compliance with the *Natural Gas Act*. The court stated (App. p. 74a):

> "Pursuant to article 2040 [of the Louisiana Civil Code] and this court's jurisprudence interpreting that article, the condition (that [Respondents] file new rate schedules) is considered fulfilled. Hence [Respondents'] failure to file the new rate schedules in no way precludes [Respondents'] recovery of damages for the entire period of [Petitioner's] breach (September 1961 through December 31, 1975) as measured by the difference in the price [Petitioner's] paid the United States government and the price [Petitioner] paid [Respondents]. To hold otherwise would be in clear contravention of the spirit and intent of article 2040 and the jurisprudence of this court."

The court also determined that having eliminated the statutory rate increase filing requirements under the *Natural Gas Act*, it could determine the rate that the Commission would have authorized Respondents to collect.[4]

[3] The foundation of the decision was the "triggering" issue—that is, whether Petitioner's market value royalty payments triggered the favored nation provision in Respondents' FPC Rate Schedule. Having denied Petitioner's application for review, the court applied the Court of Appeal's determination that triggering had occurred. It is Petitioner's position that the triggering issue should have been referred to the Commission for decision and that the state court decision is contrary to federal regulatory law, *Mobil Oil Corp.* v. *F.P.C.*, 463 F.2d 256 (D.C. Cir. 1971), cert. denied sub nom., *Mobil Oil Corp.* v. *Matzen*, 406 U.S. 976 (1972). This issue is currently before this Court.

[4] The court concluded that the Commission would have authorized Respondents to charge and to collect rate levels referred to in Commission orders now under review in the Commission proceeding (App. p. 77a). It is inappropriate for the Louisiana Supreme Court to rely on a Commission order which is being reconsidered. The Supreme Court of Louisiana also misinterpreted the Commission's order. This emphasizes the error in failing to refer these matters to the Commission which involve its exclusive jurisdiction. These matters should not be the subject of speculation by the courts. See infra, pp. 8-11.

The Louisiana Supreme Court remanded the proceeding to the state district court for a calculation of the price increase to be awarded Respondents in the form of damages for breach of contract (App. p. 81a).[5]

II. ARGUMENT

The Louisiana Supreme Court's decision underscores the error committed by the Court of Appeal in not referring to the Commission the issue of interpretation of Respondents' FPC Rate Schedule. The error has now been compounded because the Louisiana Supreme Court has infringed further upon the Commission's exclusive rate jurisdiction and has exalted state law over the paramount federal regulatory scheme set down by Congress in the *Natural Gas Act*.[6] While Petitioner understands the separate issues raised by the decision of the Supreme Court of Louisiana cannot be included

[5] The court upheld the Court of Appeal's determination that W. E. Hall, Jr., could not collect an increase in price after May 25, 1969, at which time the Rate Schedule was amended as to his interest to delete the favored nation clause (App. p. 81a).

[6] It should also be noted that Congress on November 9, 1978 enacted the *Natural Gas Policy Act of 1978*, 92 Stat. 3350. The *Natural Gas Policy Act* continues the legislative scheme of the *Natural Gas Act* as applied to natural gas dedicated on the day before the date of enactment which is the case here. The Commission also recently issued final regulations setting forth a detailed rule as to the "triggering" of price escalator clauses wherein it reaffirmed its regulatory responsibility to determine when triggering occurs and the rate consequences of triggering, if any. See

in the instant application,[7] Petitioner believes that these issues are germane to the instant case in demonstrating why the Louisiana Court of Appeal should have deferred to the Commission. It is in that context that it is necessary and appropriate for Petitioner to present additional, limited argument relating to the decision of the Supreme Court of Louisiana.

A. Louisiana Supreme Court Has Infringed Upon the Commission's Paramount and Exclusive Jurisdiction Over the Rate Increase Filing Requirements of the Natural Gas Act.

The Louisiana Supreme Court sought to ignore the rate increase filing requirements of the *Natural Gas Act* as applied to Respondents. The court did not find that the rate increase filing requirements of the *Natural Gas Act* did not apply to Respondents—but, that under the Louisiana Civil Code, Respondents' filing requirements should be considered to be fulfilled (App. p. 74a).

The Commission has exclusive jurisdiction over the rate increase filing requirements of the *Natural Gas Act* and these paramount federal regulatory requirements cannot be undone by state law. In *Ashland Oil & Refining Co.* v. *F.P.C.*, 421 F.2d 17, 20 (6th Cir. 1970), the court stated the matter concisely and clearly:

> "Under the Natural Gas Act matters of rate regulation, filing and notice procedures are within the express statutory authority of the Commission. 15 U.S.C. § 717c. This is an area in which the Commission, pursuant to Congressional authorization, has promulgated regulations. 18 C.F.R. Chapter 1, Subchap. E, §§ 154.91, 154.94. Under this act and regulations, as construed by the Commission, a change in rate levels cannot become effective without the filing of a rate change with the Commission."

"Final Regulations Amending And Clarifying Regulations Under The Natural Gas Policy Act And The Natural Gas Act," No. RM 79-22, 44 F.R. 13460 (March 12, 1979).

[7] Should the Louisiana Supreme Court deny Petitioner's application for rehearing and its decision become final, a separate petition for a writ of certiorari will be filed in this Court.

The dispute in the *Ashland* case centered around a contract clause providing for increases in seller's rate measured against buyer's resale rate and the buyer's obligations with respect to the seller's rate filing requirements. The Commission found that because the producer-seller had not made the requisite filing for the rate increase under Section 154.94 of the Regulations (App. p. 55a) and Section 4(d) of the *Natural Gas Act*, the higher rate could not be collected. The Sixth Circuit upheld the Commission's determination.

This rule of law applies with equal force to the instant case. The Commission, and only the Commission, has jurisdiction to determine what Respondents' filing requirements are and whether or not they have been fulfilled.

Moreover, it is the federal regulatory scheme that governs, not state law. The paramount nature of federal regulation under the *Natural Gas Act* over jurisdictional transactions is well established. See *Northern Natural Gas Co.* v. *State Corp. Commission*, 372 U.S. 84 (1963), and other cases cited in Petitioner's petition for a writ of certiorari, pp. 19-20.

It is clear beyond cavil, then, that the Commission has exclusive jurisdiction over the filing requirements of the *Natural Gas Act* and that the federal regulatory scheme is paramount. It is equally clear that the Louisiana courts have infringed upon the exclusive jurisdic-

tion of the Commission in applying state law in their attempt to bypass the rate filing requirements of the *Natural Gas Act*.

B. Louisiana Supreme Court Has Intruded Upon the Commission's Exclusive Authority To Determine the Rates to Which Respondents Are Entitled Under the Natural Gas Act, Which Are Those Rates on File and in Effect.

As a related point, Petitioner submits that the Louisiana Supreme Court intruded upon the Commission's exclusive jurisdiction in remanding the case to the lower Louisiana court for a calculation of the jurisdictional rate increase to be collected by Respondents from Petitioner in the guise of damages.

Under the *Natural Gas Act*, the Commission, and only the Commission, has jurisdiction to determine the rates to be charged for gas sold by Respondents. *Colorado Interstate Gas Co.* v. *F.P.C.*, 324 U.S. 581 (1945); *Natural Gas Pipeline Co.* v. *Panoma*, 349 U.S. 44 (1955); *Montana-Dakota Utilities Co.* v. *Northwestern Public Service Co.*, 341 U.S. 246 (1951); *Socony-Mobil Oil Co.* v. *Brooklyn Union Gas Co.*, 299 F.2d 692 (5th Cir. 1962), cert. denied 371 U.S. 887 (1962); *Mississippi Power & Light Co.* v. *Memphis Natural Gas Co.*, 162 F.2d 388 (5th Cir. 1947), cert. denied 332 U.S. 770 (1947); *McLeran* v. *El Paso Natural Gas Co.*, 357 F. Supp. 329, 331-32 (S.D. Tex. 1972).

In *Mississippi Power & Light Co.* v. *Memphis Natural Gas Co.*, supra, the issue was quite similar to that here. In addressing the operation of a favored nation clause and the requirements of the Commission for the filing of rate changes, the court stated, 162 F.2d at 390:

> *"Rate-making is a legislative function that the courts will not interfere with, at least until the Commission has exercised the function. To give effect to the 'favored nation' clause would operate to transfer the legislative function of rate-making from the Commission to the courts."* [Emphasis added.]

Once again, a court has no power or authority to authorize a change of rates for the sale of natural gas in interstate commerce. That responsibility is vested solely in the Commission.

Under the *Natural Gas Act*, it is also the case that Respondents are entitled only to the rates "on file . . . and in effect." This result is prescribed by the "filed-rate doctrine." See *Montana-Dakota Utilities Co.* v. *Northwestern Public Service Co.*, supra; *Hope Natural Gas Co.* v. *F.P.C.*, 134 F.2d 287 (4th Cir. 1943), rev'd on other grounds 320 U.S. 591 (1944); *Socony-Mobil Oil Co., Inc.* v. *Brooklyn Union Gas Co.*, supra; *Mississippi River Fuel Corp.* v. *F.P.C.*, 202 F.2d 899, 903-4 (3rd Cir. 1953); Cf. *Continental Oil Co.* v. *F.P.C.*, 236 F.2d 839 (5th Cir. 1956), cert. denied, 352 U.S. 966 (1957); *Shell Oil Co.* v. *F.P.C.*, 334 F.2d 1002, 1009 (3rd Cir. 1964).[8]

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[8] If, however, the Commission determined that a higher rate could be collected by Respondents, certainly an amendatory rate filing would be required. See *Plaquemines Oil and Gas Co.* v. *F.P.C.*, 450 F.2d 1334 (D.C. Cir. 1971). In that case there was no filed rate because a certificate had not been obtained from the Commission authorizing the transaction in the first instance. In those circumstances, it was held that the Commission could establish a rate retroactively. While the decision constitutes a limited exception to the bar against retroactive rate-making (which exception is not applicable here), the decision supports Petitioner's position that if the filed-rate doctrine is to be pierced, it can be done so only by the Commission in authorizing a retroactive rate increase filing and in determining the rate increase that Respondents would be authorized to collect.

The court is also wrong in its conclusion that a retroactive rate can be given by a court in Louisiana simply by labeling it damages. In *Natural Gas Pipeline Co.* v. *Harrington,* 246 F.2d 915 (5th Cir. 1957), the court passed on a claim by the pipeline for reparations because of sums paid to a producer under an invalid minimum price order of the Oklahoma State Corporation Commission. The court said, 246 F.2d 918:

> "Nor does any court possess such power for the purpose of fixing retroactively a just, reasonable and lawful rate. Here the parties themselves had fixed the rate to be charged by their solemn and binding contract, and that contract rate could be changed only by the Federal Power Commission . . ."

See also, *Interstate Natural Gas Co.* v. *Southern California Gas Co.,* 102 F.Supp. 685 (D.C. S.C., Cal., 1952), where the court said, 102 F.Supp. at 688:

> "As these cases show, the plaintiff cannot make its assault on a matter said not to be within the jurisdiction of the Commission, when adjudication must turn on matters which are within its jurisdiction. *The plaintiff cannot show damage save by showing that the Commission would approve some rate structure and some practice other than that presently existing.*" [Emphasis in original.]

In *Montana-Dakota Utilities Co.* v. *Northwestern Public Service Co.,* supra, this Court addressed the point concluding that courts are not conferred with jurisdiction to award damages as to jurisdictional rates simply because the complaining party alleges that he has been denied an administrative remedy. This Court said, 341 U.S. at 250:

> "Petitioner gives its case a differ (sic) cast by alleging that . . . its predecessor was deprived of its independence and power to resort to its administrative remedy. But the problem is whether it is open to the courts to determine what the reasonable rates during the past should have been. The petitioner, in contending that they are so empowered, and the District Court, in undertaking to exercise that power, both regard reasonableness as a justiciable legal right rather than a criterion for administrative application in determining a lawful rate. Statutory reasonableness is an abstract quality represented by an area rather than a pin-point. It allows a substantial spread between what is unreasonable because too low and what is unreasonable because too high. To reduce the abstract concept of reasonableness to concrete expression in dollars and cents is the function of the Commission. It is not the disembodied "reasonableness" but that standard when embodied in a rate which the Commission accepts or determines that governs the rights of buyer and seller. A court may think a different level more reasonable. But the prescription of the statute is a standard for the Commission to apply and, independently of Commission action, creates no right which courts may enforce. Petitioner cannot separate what Congress has joined together. It cannot litigate in a judicial forum its general right to a reasonable rate, ignoring the qualification that it shall be made specific only by exercise of the Commission's judgment, in which there is some considerable element of discretion. *It can claim no rate as a legal right that is other than the filed rate, whether fixed or merely accepted by the Commission, and not even a court can authorize commerce in the commodity on other terms. We hold that the right to a reasonable rate is the right to the rate which the Commission files or fixes, and that, except for review of the Commission's orders, the courts can assume no right to*

a different one on the ground that, in its opinion, it is the only or the more reasonable." [Emphasis added.]

III. CONCLUSION

WHEREFORE, Petitioner respectfully submits that for the reasons stated in the petition for writ of certiorari and herein, a writ of certiorari should be granted in this case to review the judgment of the Court of Appeal, Second Circuit, State of Louisiana.

Respectfully submitted,

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March, 1979

APPENDIX

APPENDIX TO PETITION FOR CERTIORARI

ADDENDUM

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APPENDIX L

SUPREME COURT OF LOUISIANA

No. 62,560

FRANK J. HALL, ET AL

v.

ARKANSAS-LOUISIANA GAS COMPANY

ON WRIT OF CERTIORARI TO THE
SECOND CIRCUIT COURT OF APPEAL
PARISH OF CADDO, STATE OF LOUISIANA

March 5, 1979

MARCUS, Justice*

Plaintiffs, royalty interest owners, working interest owners, overriding royalty interest owners and unleased mineral interest owners, instituted this suit against Arkansas-Louisiana Gas Company to recover damages arising from an alleged breach of a gas purchase contract.

Planitiffs, in their original and amended and supplemental petitions, alleged that on January 11, 1952, they, or their respective ancestors in title, entered into a gas purchase agreement with defendant wherein plaintiffs agreed to sell to defendant their natural gas, and the natural gas owned by their respective lessors, produced from certain described lands in the Sligo Gas Field, Bossier Parish, Louisiana. This agreement, by its terms, was to continue in effect from January 11, 1952, through June 1, 1980. Under the terms and provisions of this agreement, defendant was to pay a fixed schedule of prices for the natural gas delivered to it from plaintiffs. This agreement also contained a price adjustment provision, com-

* Chief Judge William A. Culpepper participated in this decision as Associate Justice Ad Hoc sitting in the place of Chief Justice Sanders, retired.

monly referred to as a favored nations clause, which provided in pertinent part:

> If at any time during the term of this agreement Buyer should purchase from another party seller gas produced from the subject wells or any other well or wells located in the Sligo Gas Field at a higher price than is provided to be paid for gas delivered under this agreement, then in such event the price to be paid for gas thereafter delivered hereunder shall be increased by an amount equal to the differences between the price provisions hereof and the concurrently effective higher price provisions of such subsequent contract. . . . It is agreed that any such higher price for gas delivered hereunder shall be effective on the first day of Buyer's accounting month (as elsewhere herein defined) next following the effective date of such subsequent contract, all subject, however, to any rules and regulations of the Office of Price Stabilization or any other regulatory body having jurisdiction.

Plaintiffs alleged that since January 11, 1952, they and their respective lessors, have sold substantial quantities of natural gas produced from wells in the Sligo Gas Field to defendant at the prices stipulated in the fixed schedule of prices as contained in the agreement. Plaintiffs further alleged that from September 1961 until the date of the institution of this action, defendant purchased from another party seller (the United States government) natural gas produced from wells located in the Sligo Gas Field at a higher price (including prices paid for both the residue or dry gas and the liquid hydrocarbons or plant products extracted from the United States government's gas delivered to defendant's pipeline system) than it was paying to plaintiffs pursuant to the January 11, 1952 gas purchase agreement for plaintiff's dry or residue gas and liquid hydrocarbons or plant products extracted from plaintiff's gas and delivered into defendant's pipeline system. By

paying a higher price to another party seller for natural gas produced from wells in the Sligo Gas Field, plaintiffs contended that defendant activated the provisions of the favored nations clause and legally obligated itself to advise plaintiffs of these facts and pay plaintiffs the higher price being paid to another party seller (the United States government) for natural gas produced from wells in the Sligo Gas Field. Plaintiffs contended that they were entitled to such higher price from the first time defendant paid such higher price to another party seller. Plaintiffs averred that defendant had at no time during the existence of the January 11, 1952 agreement informed plaintiffs, or any of their representatives, of the fact that it had been paying a higher price to another party seller for natural gas produced from wells in the Sligo Gas Field. Plaintiffs thus argued that defendant had breached the favored nations clause of their agreement by failing to pay plaintiffs a price equal to the highest price paid by defendant to any other party seller for natural gas produced from wells in the Sligo Gas Field. Plaintiffs sought damages equal to the difference between the price paid to them and the highest price paid by defendant to any other party seller for such natural gas during the period of time that defendant purchased natural gas from the United States government.

In its answer, defendant admitted that it purchased substantial quantities of natural gas from plaintiffs pursuant to the January 11, 1952 gas purchase agreement. Defendant, however, averred that it had not at any time paid anyone a price higher than that paid plaintiffs for natural gas purchased from the Sligo Gas Field and it specifically denied that it was purchasing any natural gas produced from the Sligo Gas Field from the United States government. Further answering the petition, defendant alleged that the only contract between it and the United States government relating to the production of natural gas from the Sligo Gas Field was an oil, gas, and mineral lease

dated January 23, 1961, and executed by the United States Department of the Interior in favor of Union Producing Co. and covering land situated in the Sligo Gas Field. Defendant averred that it acquired an undivided 15% interest in this lease by virtue of an assignment from Union Producing Co. on January 30, 1961, and argued that this lease did not constitute an offer or contract to sell natural gas, but, rather, granted defendant only the right to explore for, remove, and dispose of oil and gas. Hence, defendant contended, the only payments made by it to the United States government were the payments of royalty (based on the value of the natural gas and other products extracted from the natural gas) as provided in the lease and not payments for the purchase of natural gas from the United States government.

By supplemental and amended answer, defendant further alleged that the Federal Power Commission, pursuant to the provisions of the Natural Gas Act (15 U.S.C. § 717 a-w) had sole jurisdiction over the sale of natural gas by plaintiffs to defendant under the January 11, 1952 gas purchase agreement upon which this action was founded. Defendant contended that, pursuant to 15 U.S.C. § 717c (d),[1] plaintiffs were required to file and give notice of any

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[1] 15 U.S.C. § 717c(d) provides:

> Unless the Commission otherwise orders, no change shall be made by any natural-gas company in any such rate, charge, classification, or service, or in any rule, regulation, or contract relating thereto, except after thirty days' notice to the Commission and to the public. Such notice shall be given by filing with the Commission and keeping open for public inspection new schedules stating plainly the change or changes to be made in the schedule or schedules then in force and the time when the change or changes will go into effect. The Commission, for good cause shown, may allow changes to take effect without requiring the thirty day's notice herein provided for by an order specifying the changes so to be made and the time when they shall take effect and the manner in which they shall be filed and published.

proposed increase of rates, including any contractually-authorized rate increase, above the authorized initial rate and that, as plaintiffs had failed to file for such rate increase allegedly allowable under the favored nations clause, they were not lawfully authorized to collect the increased rate in this action. In addition, defendant averred that one of the named plaintiffs, W. E. Hall, Jr., executed, on May 25, 1969, an amendment to the gas purchase agreement of January 11, 1952, which deleted the favored nations clause from his contract with defendant. In view of this amendment, defendant contended that W. E. Hall, Jr. had no cause or right of action for any claim against defendant arising on or after May 25, 1969.

The trial court first held that payments made by defendant to the United States government under the terms of the lease constituted a "purchase from another party seller" within the meaning of the favored nations clause contained in the January 11, 1952 gas purchase contract entered into between plaintiffs and defendant. The court reasoned that defendant, in making payments to the United States government under its lease, was acting in a dual capacity: it was paying royalty as lessee and purchasing gas as pipeline purchaser. The court determined that defendant failed to advise plaintiffs of this fact or pay them the higher, contractually-authorized price. Having held that defendant breached the original gas purchase contract, the trial court next concluded that defendant would only be liable for damages (measured by the difference between the price paid the United States government and the price paid plaintiffs) for the period subsequent to the issuance of small producer certificates to plaintiffs in October 1972. The court reasoned that plaintiffs could not recover a "raise in prices" for the period prior to October 1972 because they had never obtained approval of a higher rate or price from the Federal Power Commission as required by 15 U.S.C. § 717c-d. The trial judge noted, however, that the regulations of the Commission (18 C.F.R. § 157.40) provide

that a "small producer," as defined in the regulations, may obtain a small producer certificate from the Commission exempting it from the necessity of filing a rate schedule in order to obtain contractually-authorized rate increases if the rate increase does not exceed the ceiling rate set by the Commission. The trial judge determined that plaintiffs had obtained such "small producer certificates" in October 1972 and concluded that plaintiffs would be entitled to a recovery of damages for the period from October 1972 through December 1975. The trial court then determined that, because W. E. Hall, Jr. amended his contract with defendant on May 25, 1969, and deleted the favored nations clause from his contract, he had no claim against defendant under the favored nations clause subsequent to May 25, 1969, and would be entitled to no recovery of damages.

The court of appeal affirmed the trial court, holding that defendant had breached the favored nations clause of its contract with plaintiffs and that plaintiffs were entitled to damages measured by the difference between the price paid by defendant to the United States government and the price paid to plaintiffs (after applying adjustments for pertinent factors) only for the period from October 1, 1972 through December 31, 1975.[2] In addition, the court of appeal held that W. E. Hall, Jr. had waived any claim for damages against defendant for the period subsequent to May 25, 1969, by entering into an amended contract with defendant on that date which deleted the favored nations clause from his contract.[3]

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[2] The court of appeal found that the calculations used by the trial judge to determine the amount of damages for the period from October 1, 1972 through December 31, 1975 were based on plaintiffs' calculations representing the entire period of the breach (September 1961 through December 31, 1975). The appellate court thus ordered the case remanded for a new trial restricted to the assessment of damages.

[3] 359 So. 2d 255 (La. App. 2d Cir. 1978).

We denied defendant's application for a writ to review the correctness of the court of appeal's decision.[4] However, on application of plaintiffs, we granted a writ limited to a consideration of whether the court of appeal was correct in denying an award of damages to plaintiffs for the period of defendant's breach prior to October 1972 and whether it was correct in holding that W. E. Hall, Jr. "waived" any claim for damages against defendant by entering into an amended contract on May 25, 1969, which deleted the favored nations clause from his contract.[5]

We note, at the outset, that this controversy involves plaintiff's claims for damages arising from defendant's breach of a gas purchase contract. The claims herein are not founded upon any liability created by the Natural Gas Act, but, rather, are founded upon a private contract deriving its force and effect from state law. There is no issue herein as to the reasonableness of the price, nor any attempt to adjudicate a proper rate, as defendant argues. Issues involving contract violation were not made subject to the cognizance of the Federal Power Commission by the enactment of the Natural Gas Act. Pan American Petroleum Corp. v. Superior Court, 366 U.S. 656 (1961). The regulatory system of the Natural Gas Act is built upon private contracts, as modified by the Act, and the Act evinces no purpose to abrogate private gas purchase contracts. United Gas Pipe Line Co. v. Mobile Gas

[4] 362 So. 2d 1120 (La. 1978). It is well settled that, when both parties apply for a writ of review, this court's denial of the application made by one of the parties constitutes our final determination upon the matters included therein. This court then will not pass a second time upon these matters at the hearing on review granted through the application of the other party. Jordan v. Travelers Insurance Company, 257 La. 995, 245 So. 2d 151 (1971). Hence, any questions relating to the determinations made by the courts below that defendant breached the favored nations clause of its gas purchase contract with plaintiffs are not now before us.

[5] 362 So. 2d 798 (La. 1978).

Service Corp., 350 U.S. 332 (1956). A determination of the appropriate measure of compensatory damages due plaintiffs as a result of defendant's breach of a private contract is, we believe, a matter particularly within the purview of our state law and state courts.

It is conceded by the parties before us that plaintiffs' recovery of damages arising from defendant's breach of the contract is to be measured by the difference between the price paid by defendant to the United States government and the price paid by it to plaintiffs (after adjustment for pertinent factors as indicated in the court of appeal opinion). The first issue presented for our resolution is a determination of whether plaintiffs are entitled to a recovery of the difference between such prices for the entire period of defendant's breach of the contract (September 1961 through December 31, 1975) or whether plaintiffs are precluded from a recovery of damages representing the period prior to October 1972.

Unless the Federal Power Commission otherwise orders, no change shall be made by any natural gas company in any rate received by it for or in connection with the transportation or sale of natural gas subject to the jurisdiction of the Commission, or contract relating thereto, except after thirty days' notice to the Commission and to the public. 15 U.S.C. § 717c(a) & (d). Such notice shall be given by filing with the Commission and keeping open for public inspection new schedules stating plainly the change or changes to be made in the schedule or schedules then in force and the time when such changes will go into effect. *Id.* (d). A "small producer" (as defined by the Commission's regulations) may obtain a "small producer certificate" exempting it from the requirement of having to file a rate schedule as long as the increase in rate does not exceed the ceiling rate set by the Commission. *See* 18 C.F.R. § 157.40. Several of the plaintiffs obtained "small producer certificates" in October 1972, and the certificates

issued to those parties were made effective as to all plaintiffs by order of the Commission. It is not disputed by the parties before us that the only rate schedule ever filed by plaintiffs with the Commission was the original gas purchase contract entered into on January 11, 1952. The trial court and court of appeal denied plaintiffs an award of damages arising from defendant's breach of contract for the period of time (*i.e.*, prior to October 1972) during which plaintiffs were required to file new rate schedules with the Commssion reflecting their entitlement under the contract, to a higher price for their natural gas sold to defendant.

La. Civ. Code art., 2040 provides:

> The condition is considered as fulfilled, when the fulfillment of it has been prevented by the party bound to perform it.

It is difficult to attach a precise meaning to the rule as it is literally set forth in the text of article 2040. This court, however, has long recognized that the English translation of this provision from the French articles as written in the Louisiana Civil Codes of 1825 (article 2035) and 1808 (article 78) is inaccurate and the French text has always prevailed in decisions of this court. *See* George W. Garig Transfer v. Harris, 226 La. 117, 75 So. 2d 28 (1954); Southport Mill v. Friedrichs, 171 La. 786, 132 So. 346 (1931); Morrison v. Minton, 163 La. 1065, 113 So. 456 (1927); Walls v. Smith, 3 La. 498 (1832) (dissenting opinion). Article 2040, properly interpreted, means that the condition is considered fulfilled, when it is the debtor, bound under that condition, who prevents the fulfillment. George W. Garig Transfer v. Harris, *supra;* Southport Mill v. Friedrichs, *supra;* Morrison v. Minton, *supra.* This rule is but an application of the long-established principles of law that he who prevents a thing may not avail himself of the non-performance he has occasioned and that one

should not be able to take advantage of his own wrongful act. *See* Cox v. Department of Highways, 252 La. 22, 209 So. 2d 9 (1962).

The favored nations clause of the contract entered into between plaintiffs and defendant provided that, if defendant purchased from another party seller gas produced from any wells located in the Sligo Gas Field at a higher price than was provided to be paid for plaintiffs' gas, defendant was bound to pay plaintiffs for the gas delivered under their contract at a price increased by an amount equal to the differences between the price provisions of plaintiffs' contract with defendant and the concurrently effective higher price provisions of defendant's contract with the other party seller. To realize this higher, contractually-authorized price, plaintiffs, pursuant to the Natural Gas Act, were required to file new rate schedules with the Commission. However, plaintiffs were effectively precluded from making the requisite filings because they were not, at any time, informed by defendant that it was, in fact, paying a higher price to another party seller. Although defendant was only bound to pay plaintiffs a higher price if plaintiffs filed new rate schedules with the Commission, it is apparent that defendant prevented the fulfillment of that condition (plaintiffs filing with the Commission) by failing to inform plaintiffs of its contractual arrangements with the United States government. Pursuant to article 2040 and this court's jurisprudence interpreting that article, the condition (that plaintiffs file new rate schedules) is considered fulfilled. Hence, plaintiffs' failure to file the new rate schedules in no way precludes plaintiffs recovery of damages for the entire period of defendant's breach (September 1961 through December 31, 1975) as measured by the difference in the price defendant paid the United States government and the price defendant paid plaintiffs. To hold otherwise would be in clear contravention of the

spirit and intent of article 2040 and the jurisprudence of this court.[6]

The court of appeal also reasoned that plaintiffs' recovery of damages for the period of defendant's breach prior to October 1972 must be denied because such recovery would necessarily assume that a price increase would have been granted by the Commission. The appellate court concluded that the issue as to whether such approval would have been granted by the Commission was highly speculative and could not serve as a basis for an award of damages.

Actual damages arising from a breach of contract must be proven; they cannot be merely speculative or conjectural. Brown v. Producers' Oil Co., 134 La. 672, 64 So. 674 (1914). It must appear reasonably certain that the amount of damages rests upon a certain basis. Brown v. Producers' Oil Co., *supra*. Such proof need be only by a preponderance of the evidence; proof by direct or circumstantial evidence is sufficient to constitute a preponderance when, taking the evidence as a whole, such proof shows that the facts or causation sought to be proved is more probable than not. *Cf.* Jordan v. Travelers Insurance Co., 257 La. 995, 245 So. 2d 151 (1971). The sufficiency of proof of damages must be determined in relation to the particular contract at issue and the circumstances surrounding its

[6] We do not believe the debtor's bad faith or fraud (or lack thereof) is relevant to a determination of whether it has prevented the fulfillment of a condition under which it is bound. Planiol, in commenting upon the French counterpart of our article 2040, states, "[t]he act of the debtor, even when free from fraud, causes to the creditor a prejudice for which reparation is due, and the most complete reparation which can be offered to the creditor is the execution of the obligation, as if the condition had been accomplished. The act of the debtor can consist of any act whatsoever which prevents the realization of the condition." 2 M. Planiol, Treatise on the Civil Law, No. 388 A (La. St. L. Inst. transl. 1959).

breach. The question of the certainty of proof of damages becomes a matter for decision in each individual case. Angelloz v. Humble Oil & Refining Co., 196 La. 604, 199 So. 656 (1940).

At trial, a November 8, 1976 order of the Commission was produced which indicated the maximum rates to which plaintiffs would have been entitled if contractually authorized and *if* proper filing procedures had been followed (Exhibit D-59). The Commission clearly indicated in its order that it would have approved such rates. No evidence was adduced by defendant to establish that Commission approval would have been unlikely. It is our opinion that, taking the evidence as a whole, plaintiffs' proof shows that it was more probable than not that the Commission would have approved a contractually-authorized price increase if the proper filing procedures had been followed. It appears reasonably certain that the amount of damages claimed by plaintiffs rests upon a certain basis.[7]

In sum, it is our opinion that plaintiffs are entitled to a recovery of an award of damages measured by the difference between the price defendant paid the United States government and the price defendant paid plaintiffs (after applying various adjustments for pertinent factors) for the entire period of defendant's breach of contract from September 1961 through December 31, 1975.

We must next determine whether W. E. Hall, Jr. waived any claim against defendant for damages arising on and after May 25, 1969, because, on that date, he entered into a contract with defendant wherein he deleted the favored nations clause from the January 11, 1952 agreement. Plaintiffs argue that Hall executed the May 25, 1969 agreement

[7] We note that plaintiffs make no claim that they would have been entitled to a price increase under their contract in excess of the respective area base rate ceilings for sales of natural gas as established by order of the Commission.

without being informed by defendant that it had activated the favored nations clause of the original agreement and that defendant misrepresented facts to Hall by informing him that it was paying plaintiffs the highest prices that it was paying any other party sellers for gas produced from the Sligo Field. Plaintiffs contend the May 25, 1969 agreement is void because Hall executed it under an error of fact.

Hall's testimony indicates that in 1969 he possessed an interest in a well (referred to as the Harvey well) under contract to Texas Gas Producing Company (Texas) with the natural gas produced therefrom being sold to Texas. In 1969, the Harvey well was nearly depleted and its pressure was dropping. The pressure on the Texas pipeline serving the Harvey well was too high for such gas to be carried through the pipeline. Hall stated that he was confronted with a situation where he was either going to have to "junk the well," buy a compressor and continue selling to Texas, or obtain a release from Texas and sell to another party with a lower pipeline pressure. After learning that the pressure on defendant's pipelines was lower than that on Texas' pipelines, Hall obtained a release from Texas and negotiated with defendant to take the gas from the Harvey well. An agreement was executed wherein defendant amended the January 11, 1952 gas purchase agreement to also cover Hall's share of the production from the Harvey well. This amendment also deleted the favored nations clause from the January 11, 1952 gas purchase contract. Hall maintained that had he been aware of the fact that defendant was paying a higher price to another party seller in the Sligo Field, he would not have agreed to the deletion of the favored nations clause. Hall also stated that his primary purpose in executing the May 25, 1969 agreement with defendant was to avoid having to purchase and operate a compressor and to be able to continue selling gas from the Harvey well.

Consent of the parties legally given is a requisite to the validity of a contract. La. Civil Code art. 1779. Consent being the concurrence of intention in two or more persons, with regard to a matter understood by all, reciprocally communicated, and resulting in each party from a free and deliberate exercise of the will, it follows that there is no consent where it has been produced by error. La. Civil Code art. 1819. An error of fact proceeds either from ignorance of that which really exists, or from a mistaken belief in the existence of that which has none. La. Civil Code art. 1821. Errors may exist as to all the circumstances and facts which relate to a contract, but it is not every error that will invalidate it. La. Civil Code art. 1823. To have that effect, the error must be in some point, which was a principal cause for making the contract and when there are several this principal cause is called the *motive* and means that consideration without which the contract would not have been made. *Id.* & art. 1825. No error in the motive can invalidate a contract, unless the other party was apprised that it was the principal cause of the agreement, or unless from the nature of the transaction it must be presumed that he knew it. La. Civil Code art. 1826. These articles of our Code simply mean that error in the determining motive, or principal cause, of a contract vitiates consent and invalidates the contract. Error as to a subsidiary motive has no effect upon the validity of the contract. Cryer v. M & M Manufacturing Co., Inc., 273 So. 2d 818 (La. 1972); Stack v. Irwin, 246 La. 777, 167 So. 2d 363 (1964); Carpenter v. Skinner, 224 La. 848, 71 So. 2d 133 (1954).

A review of the record convinces us that the error relied upon by plaintiffs to invalidate the May 25, 1969 agreement was not an error in the determining motive, or principal cause, of the agreement. Hall's testimony clearly indicates that the determining motive, or principal cause, of the agreement was his desire to continue selling gas from the Harvey well and to avoid purchasing and operating a

compressor for the Harvey well. Any error relating to the issue as to whether defendant had activated the favored nations clause of the original agreement was only error as to a subsidiary motive and has no effect upon the validity of the May 25, 1969 agreement. Hence, we determine that the May 25, 1969 agreement is not invalid as having been executed by Hall under an error of fact.

We construe plaintiffs' allegations as a contention that the misrepresentations and omissions of defendant invalidated the contract because they constituted fraud.

Fraud, as applied to contracts, is the cause of an error bearing on a material part of the contract, created or continued by artifice, with design to obtain some unjust advantages to the one party, or to cause an inconvenience or loss to the other. La. Civil Code art. 1847. Two elements are essential to constitute legal fraud: the intention to defraud and loss or damage or a strong probability of loss or damage. Buxton v. McKendrick, 223 La. 62, 64 So. 2d 844 (1953). It is well setted that one who alleges fraud has the burden of establishing it by legal and convincing evidence since fraud is never presumed, and that to establish fraud exceptionally strong proof must be adduced. Buxton v. McKendrick, *supra;* Sanders v. Sanders, 222 La. 233, 62 So. 2d 284 (1952).

The trial court made no finding that defendant fraudulently concealed or misrepresented facts relating to its activation of the favored nations clause. The court of appeal, in affirming the trial court's determination on this issue, found the evidence insufficient to support plaintiffs' allegation of fraud. We have reviewed the record and it is our opinion that the determination made by the lower courts on this issue is correct. Plaintiffs failed to prove that defendant possessed the requisite intent to defraud.[8] Hence,

[8] In fact, it appears that the deletion of the favored nations clause from the original agreement was an effort by defendants to comply with the orders and regulations of the Federal Power Commission. By Order No. 232 A (25 F.P.C. 609), issued March 31, 1961, the Commission amended its regulations so as to provide that indefinite price escalation clauses (including favored nations clauses) in sales contracts executed on or after April 3, 1961, for the sale or transportation of natural gas subject to the jurisdiction of the Commission would be inoperative and of no effect at law. By Order No. 242 (27 F.P.C. 339), issued February 8, 1962, the Commission further amended its regulations to provide for the rejection of contracts containing such indefinite escalation clauses. *See* 18 C.F.R. §§ 154.93, 157.14 and 157.25.

the May 25, 1969 agreement executed by W. E. Hall, Jr. cannot be invalidated on the basis of alleged fraudulent conduct of defendant.

In sum, we conclude that the May 25, 1969 amendment to the original gas purchase contract executed by W. E. Hall, Jr. is a valid and enforceable agreement. Since the effect of this agreement was to delete the favored nations clause from the original contract, W. E. Hall, Jr. has no claims for damages against defendant arising on or after May 25, 1969.

Decree

For the reasons assigned, judgment of the court of appeal is amended to allow plaintiffs (except W. E. Hall, Jr.) an award of damages measured by the difference between the price paid the United States government and the price defendant paid plaintiffs for the entire period of defendant's breach of contract from September 1961 through December 31, 1975; W. E. Hall, Jr.'s recovery of damages against defendant is to be measured for the period of time from September 1961 through May 24, 1969. The case is remanded to the district court for assessment of damages in accordance with the views herein expressed.

SUPREME COURT OF LOUISIANA

No. 62560

FRANK J. HALL et al.

Versus

ARKANSAS-LOUISIANA GAS COMPANY

DIXON, Justice (concurring)

I fully subscribe to the opinion, but believe C.C. 2040 is applicable only by analogy, and that C.C. 2040 is probably a clarification of the original French text, not an "inaccurate" translation.

Supreme Court, U. S.
FILED
JAN 20 1979
MICHAEL RODAK, JR., CLERK

No. 78-986

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

ARKANSAS LOUISIANA GAS COMPANY, *Petitioner,*

v.

FRANK J. HALL, MRS. W. E. HALL, SR., THE H. M. HARRELL TESTAMENTARY TRUST, JAMES E. HARRELL, JOHN K. HARRELL, SR., ASA BENTON ALLEN, SIDNEY G. MYERS, JR., W. O. COCHRAN, THOMAS F. PHILYAW, MRS. ELAINE ALLEN, JAMES A. NOE, D. B. MCCONNELL, MRS. EVA L. WEISS, SOL KAPLAN and NATIONAL AMERICAN BANK, New Orleans, Co-Testamentary Executors of the SUCCESSION OF SEYMOUR WEISS, *Respondents.*

BRIEF FOR RESPONDENTS IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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January 1979

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-986

ARKANSAS LOUISIANA GAS COMPANY, *Petitioner,*

v.

FRANK J. HALL, MRS. W. E. HALL, SR., THE H. M. HARRELL TESTAMENTARY TRUST, JAMES E. HARRELL, JOHN K. HARRELL, SR., ASA BENTON ALLEN, SIDNEY G. MYERS, JR., W. O. COCHRAN, THOMAS F. PHILYAW, MRS. ELAINE ALLEN, JAMES A. NOE, D. B. MCCONNELL, MRS. EVA L. WEISS, SOL KAPLAN and NATIONAL AMERICAN BANK, New Orleans, Co-Testamentary Executors of the SUCCESSION OF SEYMOUR WEISS, *Respondents.*

BRIEF FOR RESPONDENTS IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

PRELIMINARY INTRODUCTION

Contrary to the erroneous assertions and analyses as set forth in ARKANSAS LOUISIANA GAS COMPANY'S ("Arkla") Petition for Writ of Certiorari as filed with this Court herein, the instant lawsuit between Petitioner and the fifteen Respondents herein, FRANK J. HALL, ET AL., has since July 18, 1974, involved a classic action for damages and reparations for the

breach and violation of a private gas sales contract and "arises under" well established rules and principles of applicable state contract law. Moreover, as evidenced and confirmed by both Petitioner's and Respondents' pleadings, the evidence, and the decisions of the courts below, this case has from its inception presented the same factual and contractual issues, i.e., liability or breach of contract, and quantum of damages, which have heretofore been properly and consistently presented to and resolved by appropriate courts under applicable and controlling rules and principles of contract law. *Skelly Oil Co.* v. *Phillips Petroleum Co.*, 399 U.S. 667 (1950); *Pan American Petroleum Corp.* v. *Superior Court*, 366 U.S. 656 (1961); *Gulf Oil Corp.* v. *American Louisiana Pipeline Co.*, 282 F.2d 401 (6th Cir. 1960); *Eastern Petroleum Co.* v. *Kerr-McGee Corp.*, 447 F.2d 569 (7th Cir. 1971); *Western Natural Gas Co.* v. *Cities Service Gas Co.*, 507 P.2d 1236 (Okla. 1972), *appeal dismissed* and *certiorari denied*, 409 U.S. 1052 (1972); and *Louisiana-Nevada Transit Co.* v. *Woods*, 393 F. Supp. 177 (W.D. Ark. 1975), *affirmed* by the United States Court of Appeals for the Eighth Circuit in a per curiam opinion on March 15, 1976.

The basic wrongs, injuries, damages, and injustices for which the Respondents herein have been diligently seeking reparations and compensation for almost five years "arise" out of the fact that Arkla as their contractual obligor under the subject contract breached and violated their contractual rights for fourteen years and by means of its own "uncooperative," "evasive," and "not commendable" conduct beginning in 1961 successfully withheld and concealed all of the true, relevant, and material facts concerning its continued

breach of contract from Respondents for fourteen years. During this fourteen-year period Arkla as Respondents' contractual obligor has by means of its own "uncooperative," "evasive," and "not commendable" conduct obstructed, frustrated, destroyed, and defeated Respondents' contractual rights and legal opportunity to obtain and receive higher prices, as contractually authorized, for their liquefiable hydrocarbons, extracted plant products, and dry or residue gas in a manner consistent with the true intent of the contract and all applicable laws, rules, and regulations. In that the similarly injured and aggrieved parties in the above-cited cases were fully compensated and indemnified for all actual losses and damages incurred and sustained as the result of the breach and violation of their legal and contractual rights under similar gas sales contracts by virtue of applicable and controlling principles of contract law, Respondents herein respectfully submit that in the final analysis they must also be fully protected and fully compensated for all of the actual losses and damages that they have similarly sustained and incurred due to Arkla's continued breach of contract and Arkla's destruction and frustration of their legal and contractual rights for fourteen years.

Arkla by withholding and concealing all of the true, relevant, and material facts concerning the nature and extent of Respondents' contractual rights for fourteen years obviously breached and violated its affirmative legal duty and contractual obligation to timely and in good faith "cooperate" with Respondents in obtaining any requisite administrative approval in order to fully implement and timely effectuate Respondents' legal and contractual rights beginning in the fall of 1961. Contrary to Arkla's contentions here-

in, the courts of this nation have in accordance with well established rules and principles of law, equity, and justice uniformly recognized and enforced the contractual duty and obligation of a party to a contract not to obstruct, frustrate, or defeat the other party's opportunity to obtain administrative approval that may be required to carry out the intent and purpose of the contract. *United States* v. *Peck,* 102 U.S. 64 (1880); *Western Natural Gas Co.* v. *Cities Service Gas Co.,* 507 P.2d 1236 (Okla. 1972), *appeal dismissed* and *certiorari denied,* 409 U.S. 1052 (1972); *Gulf Oil Corp.* v. *American Louisiana Pipe Line Co.,* 282 F.2d 401 (6th Cir. 1960); *Atlas Trading Corp.* v. *S. H. Grossman, Inc.,* 169 F.2d 240 (3d Cir. 1948); *Vanadium Corp. of America* v. *Fidelity and Deposit Co.,* 159 F.2d 105 (2d Cir. 1947); *Watson Bros. Transportation Co.* v. *Jaffa,* 143 F.2d 340 (8th Cir. 1944); *Rochester Park, Inc.* v. *City of Rochester,* 238 N.Y.S. 2d 822 (1963), *aff'd,* 241 N.Y.S.2d 763; *Lennon* v. *Habit,* 216 N.C. 141, 4 S.E.2d 339 (1939); *George W. Garig Transfer, Inc.* v. *Harris,* 226 La. 117, 75 So.2d 28 (1954); and *Cities Service Gas Co.* v. *FPC,* 535 F.2d 1278 (D.C. Cir. 1976).

Arkla in the instant proceeding has petitioned this Court for a writ of certiorari based upon the same jurisdictional allegations and theories that were similarly asserted by Cities Service Gas Company, as a similarly situated pipeline-purchaser and contractual-obligor under a similar private gas sales contract that covered the sale and transmission of natural gas in interstate commerce and was "filed" as "part of a rate schedule" with the Federal Power Commission under the Natural Gas Act, in the case of *Cities Service Gas Co.* v. *Western Natural Gas Co.,* 409 U.S. 1052 (1972). Arkla's similar jurisdictional theories and assertions

as asserted in its Petition for a Writ of Certiorari, just like the jurisdictional theories of Cities Service Gas Company, have been consistently rejected by this Court and are clearly contrary to this Court's decisions in *Skelly Oil Co.* v. *Phillips Petroleum Co., supra,* and *Pan American Petroleum Corp.* v. *Superior Court, supra.*

STATEMENT OF THE CASE

Respondents are royalty owners and working interest owners under various oil and gas leases in the Sligo Gas Field, Bossier Parish, Louisiana. In January 1952, Respondents as royalty owners and working interest owners entered into a contract with Petitioner, a natural gas pipeline company that owned a pipeline system and a gas processing plant in the Sligo Gas Field, to sell to Arkla their liquefiable hydrocarbons, extracted plant products, and residue royalty gas and working interest gas as produced from their leases. The contract terms were negotiated at length. Arkla's prime objective was to obtain a long-term contract, and as concluded, the contract had a twenty-eight year term, from 1952 until 1980. As an inducement for Respondents to contractually bind themselves for such an extended period, Arkla offered to include and there was included a "favored nations" clause, which provided in essence that if Arkla should subsequently purchase any gas from any well or wells in the Sligo Gas Field, Bossier Parish, Louisiana, at a price higher than the prices provided for in the subject contract for Respondents' royalty gas and working interest gas, the price to Respondents would go up to the same level after a consideration of all "pertinent factors" with respect to the two prices in question. The subject "favored nations" clause was clearly designed and in-

tended to be a contractual right and benefit for Respondents and was clearly designed and intended to protect Respondents as sellers under the long-term contract by tying Respondents' contractually authorized prices for their liquefiable hydrocarbons, extracted plant products, and dry or residue gas to the highest prices that Arkla subsequently paid for any "comparable" production in the Sligo Gas Field under any subsequent contract, written or oral. Conversely, the subject "favored nations" clause clearly represented a binding contractual obligation on the part of Arkla, the intent and purpose of which Arkla was not free to ignore, frustrate, or defeat for its own corporate purposes.

In 1961, Arkla, in its dual capacity as a lessee and pipeline-purchaser that owned and operated a pipeline and processing plant in the Sligo Gas Field, contractually acquired a working interest under a protective lease contract from the United States Government covering 2,419.30 acres in the Sligo Gas Field, Bossier Parish, Louisiana. The United States Government as the fee landowner reserved a one-sixth royalty interest in the production obtained from said lands, which it could take in kind or exchange for cash. The Government subsequently elected not to take its share of the royalty gas in kind for its own use, but rather elected to be paid money for its fractional share of the gas produced from its lands and delivered into Arkla's Sligo pipeline system and Arkla's Sligo gas processing plant. Section 2(n) of Arkla's 1961 contract with the United States Government expressly provided that:

> "*Lessee agrees: If owner, or operator, or owner of a controlling interest in any pipe line* or of any company operating the same which may be operated accessible to the oil or gas derived from lands under this lease, to accept and convey and, if a purchaser of such products, *to purchase at reasonable rates and without discrimination the oil or gas of the Government* or of any citizen or company not the owner of any pipe line, operating a lease or purchasing or selling oil, gas, natural gasoline, or other products obtained under a lease or permit granted by the United States." (emphasis added)

In complying with Section 2(n) of the 1961 contract with the Government, Arkla by means of its November 15, 1962 letter agreement with the United States Government expressly agreed that:

> "By your letter of March 27, 1962 you determined prices, so far as concerns the Government's royalty gas of $0.117432 per mcf until January 1, 1962; $0.130252 until January 1, 1967 and thereafter $0.140508 at a pressure base of 15.025 p.s.i.a. In view of the Government's right under the lease contract to determine the value of its royalty gas, but without conceding that the above figures represent market value in the Sligo Field, we have decided that we should accede to the determination and have initiated the proper procedures in our organization to see that accounting and payment is made for Arkansas Louisiana Gas Company's share of the gas at the above figures."

As determined by the courts below, Arkla from 1961 through 1975 in its dual capacity as a lessee and pipeline-purchaser and a pipeline-owner in the Sligo Gas Field fully complied with Section 2(n) of its 1961 contract with the United States Government and their November 15, 1962 letter agreement by paying the agreed-upon prices per Mcf for the Government's

share of the royalty gas and liquid hydrocarbons delivered into its Sligo pipeline system and gas processing plant by means of monthly checks drawn and issued on Arkla's "Gas Purchase Account." The monthly payments made by Arkla to the United States Government from 1961 through 1975 by means of checks drawn on its "Gas Purchase Account" were in payment for the Government's share of the dry or residue gas, liquefiable hydrocarbons, and extracted plant products as produced from its lands and delivered into Arkla's Sligo pipeline and gas processing plant.

Arkla was cautioned and warned by its own officers and officials in 1961 that its payment of higher prices for the Government's royalty gas might breach and trigger Respondents' "favored nations" rights under the subject contract and thus cost Arkla substantial sums of money. (App. 1a-6a.) As noted by the courts below, Arkla by means of its own "uncooperative," "evasive," and "not commendable" conduct was successful in withholding and effectively concealing from Respondents for fourteen years the existence and nature of its contractual agreements with the Government pursuant to which Arkla had consistently paid higher prices for the Government's liquefiable hydrocarbons, extracted plant products, and dry or residue gas as produced from the same Sligo Gas Field. (App. 7a-9a.)

In January of 1974 Respondents for the first time inadvertently heard a rumor about Arkla's paying higher prices for the Government's royalty gas and pursuant to the Freedom of Information Act ultimately discovered the contractual arrangements between Arkla and the United States Government. In June 1974, Respondents were for the first time truthfully advised and informed by the United States Department of the Interior that:

> "The Geological Survey made a determination, by letter dated March 27, 1962, that the following prices would be required for the Government's royalty gas: $0.117432 per MCF until January 1, 1962; $0.130252 until January 1, 1967; and $0.140508 thereafter, all at 15.025 p.s.i.a. Arkansas Louisiana Gas Company, in view of the Government's right under the lease contract to determine the value of its royalty gas, but without conceding that the prices represented market value in the Sligo field, acceded to the price determination made by this office. Effective May 1, 1974, this office made a new determination that the price for the Government's royalty gas taken by Arkansas Louisiana Gas Company would be $0.26 per MCF. . . . The United States Government has not, during the existence of the captioned Oil, Gas and Mineral Lease, elected to take a portion of the gas produced in kind, rather than sell its portion to various parties."

In July 1974 the Respondents made an amicable demand upon Arkla for all of the true, relevant, and material facts concerning Arkla's payment of higher prices for the Government's royalty gas in the Sligo Gas Field since 1961 and for a full accounting of all the losses and damages that Arkla caused the Respondents to sustain and incur for fourteen years due to its "uncooperative," "evasive," and "not commendable" breach of contract. Arkla refused to disclose any facts and to render any accounting whatsoever. (See App. 8a-9a.) Thus, on July 18, 1974, the Respondents instituted an action for damages for Arkla's continued breach of contract and for the losses sustained and incurred due to the fact that Arkla had successfully defeated and destroyed their legal and contractual

rights for fourteen years by virtue of its failure to timely "cooperate" with Respondents and its "uncooperative," "evasive," and "not commendable" withholding of the true facts from Respondents for fourteen years. Arkla countered Respondents' action for breach of contract with a "Petition-in-Reconvention for Declaratory Judgment" by which it invoked the original jurisdiction of the Louisiana state district court to construe and interpret the subject contract in order to determine and establish the "true intent" of the parties to said contract. (App. 10a-21a.) Specifically, Arkla in its "Petition for Declaratory Judgment" as filed with the Louisiana courts judicially asserted that:

> "Arkla's object in the suit is to obtain a judgment and decree declaring its rights against defendants in reconvention, for the past and for the future, with respect to the contract, hereinafter described and referred to, between Arkla and defendants in reconvention, with particular reference to the effect of Arkla's payments of royalties to its lessors under oil and gas leases covering lands in the Sligo Gas Field, Bossier Parish, Louisiana; and to resolve the dispute, hereinafter described, which has arisen between Arkla and defendants in reconvention with respect to the application of that contract to the facts hereinafter alleged. . . .
>
> Wherefore, Arkansas Louisiana Gas Company, plaintiff in reconvention, prays that defendants in reconvention be served with copies of this reconventional demand, and that, after trial, there be judgment of this reconventional demand in its favor and against defendant in reconvention, ..."

Arkla in conjunction with its "Petition for Declaratory Judgment" filed with the Louisiana district court a "Motion for Separate Trial of the Liability and Quantum of Damages Issue in this Suit." (App. 22a-25a.) Arkla in its Motion as filed with the Louisiana state district court judicially asserted and conceded that:

> "Plaintiffs have cumulated in this suit, as appears from the prayer of their petition, an action for declaratory judgment, an action for damages for breach of contract, and an action for an accounting; and defendant has filed herein a reconvention demand seeking a declaration of rights as between plaintiffs and defendant under the contract between them alleged in plaintiffs' petition.
>
> *Defendant does not assert that the cumulation of actions existing in this judicial proceeding is improper;* but it shows that the evidence necessary for the court's decision upon the application of the gas sales contract alleged by plaintiffs and admitted by defendants, to the facts with regard to defendant's royalty settlements under the United States Government lease also alleged in plaintiffs' petition, is relatively simple and involves principally legal rather than factual questions. Whereas, plaintiffs' claim for damages and demand for an accounting would involve evidence on, and determinations by the court as to, the details of each monthly settlement between plaintiffs and defendant since early 1961, and recalculation of the prices in such settlements in accordance with plaintiffs' version of their rights, namely, it would require repricing each monthly settlement for each plaintiff in accordance with royalty settlements under the government lease.
>
> *Only if plaintiffs prevail in their interpretation of their rights under the contract would the monumental accounting described above be necessary."* (emphasis added)

In light of Respondents' action for damages for breach of contract and Arkla's "Petition for Declaratory Judgment" construing the contractual rights and

liabilities of the parties to the subject contract, the Louisiana district court tried these factual and contractual issues, i.e., liability or breach of contract, and quantum of damages, beginning on September 27, 1976, and ending on January 14, 1977. The trial court heard the sworn testimony of numerous witnesses as called by both Respondents and Petitioner, and the sworn testimony fills a transcript of 4,987 pages. Respondents filed 367 items of documentary evidence and Petitioner filed 87 items of documentary evidence during the trial of this case. Both the Louisiana state district court and the Louisiana court of appeal have after four and one-half years of litigation now definitively construed and interpreted the subject contract in light of the true intent of the parties to the contract based on the evidence adduced at the trial of this case under applicable rules and principles of contract law. In light of the evidence in this case with respect to the true intention of the parties to this specific contract, the Louisiana courts below have by interpreting the subject contract consistently resolved and adjudicated the liability, or breach of contract, issue in favor of Respondents and adversely to Arkla. The decisions of the Louisiana courts below on the liability, or breach of contract, issue are entirely consistent with the decisions as rendered by other courts under applicable principles of contract law in *Gulf Oil Corp.* v. *American Louisiana Pipe Line Co.*, 282 F.2d 401 (6th Cir. 1960); *Eastern Petroleum Co.* v. *Kerr-McGee Corp.*, 447 F.2d 569 (7th Cir. 1971); *Louisiana-Nevada Transit Co.* v. *Woods*, 393 F. Supp. 177 (W.D. Ark. 1975), *affirmed* by the United States Court of Appeals for the Eighth Circuit in a per curiam opinion on March 15, 1976; and *Western Natural Gas Co.* v. *Cities Service Gas Co.*, 507 P.2d

1236 (Okla. 1972), *appeal dismissed* and *certiorari denied*, 409 U.S. 1052 (1972).

With respect to the quantum of damages issue, the Louisiana district court awarded Respondents $913,-626.79 in compensatory damages for the actual losses sustained and incurred from 1972 through 1975 due to Arkla's breach of contract. The Louisiana court of appeal affirmed the state district court's decision on the liability, or breach of contract, issue but remanded the quantum of damages issue to the district court for a recalculation of damages.

Arkla's Petition for a Writ of Certiorari to the Louisiana Supreme Court, which complained of the lower courts' resolution of the liability and quantum of damages issue, was denied. The Louisiana Supreme Court granted Respondents' petition for certiorari with respect to their request for an increase in the damages as awarded by the district court. The quantum of damages issue has been fully briefed, argued, and submitted by both Respondents and Arkla and is presently pending before the Louisiana Supreme Court for resolution and decision.

ARGUMENT

This case has from its inception presented a basic contractual dispute over the meaning and intent of the subject contract between Respondents and Arkla dated January 11, 1952, and the resolution of this disputed issue of contract interpretation clearly does not involve any substantial federal question. Clearly, contrary to Arkla's erroneous assertions, the decisions of the Louisiana state courts will not affect anyone but the parties to this specific and single contract in light of

the true intent of the parties to this particular contract under the factual circumstances of this specific case.

Arkla, after having thoroughly tried, submitted, and lost these disputed factual and contractual issues before the Louisiana state courts below, now seeks to have this Court review and modify the factual findings and contractual decisions as rendered and to be rendered by the Louisiana courts in light of the evidence in this case. While the grounds upon which Arkla seeks a writ of certiorari from this Court are rather diffuse and interwoven, Arkla's major thesis is that actions for damages for the breach of gas sales contracts and the interpretation of gas sales contracts "arise under" federal law (Natural Gas Act) and not state contract law. Arkla in support of its petition further argues that the Federal Power Commission (now Federal Energy Regulatory Commission) has the sole and exclusive jurisdiction to interpret gas sales contracts and to award compensatory damages and monetary reparations for the breach and violation of gas sales contracts.

This same erroneous thesis was the primary basis for Cities Service Gas Company's Petition for a Writ of Certiorari in *Cities Service Gas Co.* v. *Western Natural Gas Co.*, No. 72-600 on the docket of this Court, which was denied by this Court on December 11, 1972 in *Cities Service Gas Co.* v. *Western Natural Gas Co.*, 409 U.S. 1052.

A. The Interpretation of the Contract.

The decided cases on these points completely refute Arkla's erroneous contentions that the Federal Power Commission, and now the Federal Energy Regulatory Commission, have since the enactment of the Natural

Gas Act in 1938 had sole and exclusive jurisdiction over actions for damages for the breach of gas sales contracts. Contrary to Arkla's totally erroneous and misplaced contentions that actions for damages for the breach and violation of private gas sales contracts "arise under" federal law, i.e., the Natural Gas Act, not state contract law, this Court in the case of *Skelly Oil Co.* v. *Phillips Petroleum Co.*, 399 U.S. 667 (1950), some twelve years after the Natural Gas Act was enacted by Congress, expressly held that with regard to private gas sales contracts for the sale of natural gas in interstate commerce:

> "If Phillips sought damages from petitioner or specific performance of their contracts, it could not bring suit in a United States District Court on the theory that it was asserting a federal right. And for the simple reason that such a suit would 'arise' under the State law governing the contracts."

This Court in the case of *United Gas Pipe Line Co.* v. *Mobile Gas Corp.*, 350 U.S. 332 (1956), again confirmed that the Natural Gas Act did not destroy or abrogate the integrity of private gas sales contracts and expressly held that:

> "The Natural Gas Act, on the other hand, recognizes the need for private contracts of varying terms and expressly provides for the filing of such contracts as a part of the rate schedules.
>
> The Act thus affords a reasonable accommodation between the conflicting interests of contract stability on the one hand and public regulation on the other . . .
>
> By preserving the integrity of contracts, it permits the stability of supply arrangements which all

agree is essential to the health of the natural gas industry. . . ."

This Court in the case of *Pan American Petroleum Corp.* v. *Superior Court,* 366 U.S. 656 (1961), in a case involving a claim for over $10,000,000 in damages for the breach of a gas sales contract filed with the Federal Power Commission and covering gas sold in interstate commerce, unanimously and expressly held that:

> "Suit was brought in a state court on a common-law contract claim. . . .
>
> The rights as asserted by Cities Service are traditional common-law claims. They do not lose their character because it is common knowledge that there exists a scheme of federal regulation of interstate transmission of natural gas. . . .
>
> We hold that the state courts of Delaware do have jurisdiction to hear and decide the claims that Cities Service has formulated.
>
> *Affirmed."*

Consistent with this Court's decisions in the above and foregoing cases, the courts of this nation have repeatedly recognized and held that the Natural Gas Act does not destroy or abrogate the jurisdiction and authority of the courts to resolve actions for damages for breach of contract. The court in the case of *Ashland Oil & Refining Co.* v. *FPC,* 421 F.2d 17, 20, 23 (6th Cir. 1970), expressly held:

> "*The District Court has jurisdiction in an action based upon asserted breach of contract. . . .*
>
> *The Commission did not undertake to interpret the contracts between the parties. . . .*
>
> In conclusion we re-emphasize that the jurisdiction of this Court in reviewing an order of the

Commission is extremely narrow. F.P.C. v. Natural Gas Pipeline Co., 315 U.S. 575, 585, 62 S.Ct. 736, 86 L.Ed. 1037. *We express no opinion as to what effect the Commission's order or the opinion of this Court in the present proceeding may have upon the case now pending in the United States District Court in Oklahoma. These are matters for determination by the District Court and ultimately by the Court of Appeals of the Tenth Circuit.*

The order of the Commission points out that the court litigation involves contractual issues pertaining to the applicability of the statute of limitations, unjust enrichment and estoppel. There is also presented a contractual question involving helium. The Commission did not pass upon these issues, and this Court does not do so." (emphasis added)

In *Cities Service Gas Co.* v. *FPC,* 535 F.2d 1278 (D.C. Cir. 1976), the court of appeals expressly approved the measure of damages as awarded by the Oklahoma courts to Western Natural Gas Company for the breach and violation of a similar 1949 gas sales contract that covered the transmission and sale of natural gas in interstate commerce and was "filed" with the Federal Power Commission as "part of a rate schedule" under the Natural Gas Act.

In *City of New Orleans* v. *United Gas Pipe Line Co.,* 390 F. Supp. 861 (E.D. La. 1974), the court in following and adhering to this Court's decision in the case of *Pan American Petroleum Corp.* v. *Superior Court, supra,* expressly held:

> "The defendants assert that of necessity these suits involve federal questions. Their first thesis is that the claims must be resolved under the Natural Gas

Act. The contention that contractual claims between parties to a natural gas contract arise under the Natural Gas Act is not res nova; similar arguments were presented to the United States Supreme Court in Pan American Petroleum Co. v. Superior Court of Delaware, 1961, 366 U.S. 656, 81 S.Ct. 1303, 6 L.Ed.2d 584. Although the contentions were presented in a different context, that decision involved issues indistinguishable from those presented here.

'The rights asserted,' as the Court observed in Pan American, 'are traditional common-law claims. They do not lose their character because it is common knowledge that there exists a scheme of federal regulation of interstate transmission of natural gas.' 366 U.S. at 663, 81 S.Ct. at 1307.

The legislation was thus carefully fashioned to exert federal control only in a limited and well-defined area. It would distort that pattern beyond recognition to find inherent in this plan a proscription of state legislation allowing parties to contract to sell natural gas in interstate commerce, or of state law prescribing liability for the breach of such a contract."

In *State of Louisiana* v. *FPC,* 503 F.2d 844, 866 (5th Cir. 1974), the court held:

> "In regard to general damage liability for breach of contract, FPC reasoned that United would be vulnerable if its need to curtail resulted from its own negligence, bad faith, or wrongful conduct. . . .
>
> '. . . we have neither the power nor desire to adjudicate United's contract liability, for as recognized in *International Paper,* that is within the province of the appropriate court.' . . ."

In *Skelly Oil Co.* v. *FPC,* 532 F.2d 177, 179 (10th Cir. 1976), the court held:

> *"This is a matter of ordinary contract law, a Williston-Corbin problem, and, as we consider this petition, nothing more than that. The Natural Gas Act does not alter the ordinary contractual relationships. United Gas Pipe Line Co.* v. *Mobile Gas Service Corp.,* 350 U.S. 332, 76 S.Ct. 373, 100 L.Ed. 373; *Phillips Petroleum Co.* v. *Federal Power Comm'n,* 349 F.2d 535 (10th Cir.). *See also* the termination in *Gulf Oil Corp.* v. *American Louisiana Pipe Line Co.,* 282 F.2d 401 (6th Cir.)." (emphasis added)

In *FPC* v. *Hope Natural Gas Co.,* 320 U.S. 591 (1944), the Court held:

> *"It is conceded that under the* [*Natural Gas*] *Act the Commission has no power to make reparation orders."* (emphasis added)

In *FPC* v. *Sunray DX Oil Co.,* 391 U.S. 9 (1968), the Court held:

> "This would amount to a reparation order, and this Court has repeatedly held that the Commission has no reparations power."

As correctly noted by the Oklahoma Supreme Court in the case of *Western Natural Gas Co.* v. *Cities Service Co., supra:*

> "Here the FPC could not take remedial cognizance over Cities' contract violation. . . . Issues involving contract violation were not made subject to the cognizance of FPC by the enactment of the Natural Gas Act. Pan American Petroleum Corp. v. Superior Court, 366 U.S. 656, 81 S.Ct. 1303, 6 L.Ed.2d 584; Gulf, supra."

The decision of the court in the case of *Pure Oil Co.* v. *FPC,* 299 F.2d 370 (7th Cir. 1962), further

refutes Arkla's erroneous jurisdictional contentions as again asserted in the instant proceeding, to wit:

> ". . . the issue with reference to the scope of the comparability clauses is a matter of contract construction which does not here involve a subject within the Commission's special competence. (Cf. Texas Gas Transmission Corp. v. Shell Oil Co., 363 U.S. 263, 80 S.Ct. 1122, 4 L.Ed.2d 1208; Warren Petroleum Corp. v. Federal Power Commission, 10 Cir. 282 F.2d 312). . . ."

The decision of the court in the case of *Pan American Petroleum Corp.* v. *Kansas-Nebraska Natural Gas Co.*, 297 F.2d 561, 566 (8th Cir. 1962), further confirms the correctness of the Louisiana state courts' jurisdictional rulings and the incorrectness of Arkla's erroneous jurisdictional assertions in the instant proceeding, to wit:

> "We think the answer is found in the recent case of the Supreme Court of the United States, Pan American Petroleum Corp. v. Superior Court of Delaware, 1961, 366 U.S. 656, 81 S.Ct. 1303, 6 L.Ed.2d 584. The sole issue there was whether the Delaware Superior Court could take jurisdiction of a case which was bottomed on circumstances identical with those involved herein. The Delaware Supreme Court had sustained its lower court's finding of jurisdiction, stating that the claims of Cities Service '* * * are not founded upon any liability *created* by the Natural Gas Act but upon a private contract deriving its force from state law.' (Emphasis in the original.) Columbian Fuel Corp. v. Superior Court of Delaware, Del. 1960, 153 A.2d 478, 482. In affirming the Delaware court, Mr. Justice Frankfurter said at page 663 of 366 U.S., at page 1307 of 81 S.Ct.:

> 'The rights as asserted by Cities Service are traditional common-law claims. They do not lose their character because it is common knowledge that there exists a scheme of federal regulation of interstate transmission of natural gas.' . . ."

In light of the above-cited cases, the Federal Power Commission long ago formally adopted a policy deferring "contractual issues" and "contractual disputes" involving jurisdictional sales to the appropriate courts. *See Rowan* v. *Allied Chemical Corp.*, 39 F.P.C. 64, 66-67 (1968), where the Commission expressly held and confirmed that:

> "The *Huber* and *Weymouth* cases thus support the view that the Commission does not have primary jurisdiction over contract questions relating to a jurisdictional sale and that a court may properly decide such questions. . . .
>
> It has been the Commission's policy to defer action on contract questions presented to it involving jurisdictional matters pertaining to natural gas which are pending in court. Such contract questions have been decided by the Commission only when neither party has sought a determination in an appropriate court.
>
> The contractual questions presented by Rowan have been fully litigated in court on the issue of liability, although not yet decided. It should also be noted that with respect to the questions presented in court as to the price for the sale of gasoline and other products recovered from the casinghead gas, the Commission has no jurisdiction. In these circumstances we believe it appropriate to defer to the court to decide these contract questions."

In a recent order involving the Commission's primary jurisdiction, the Federal Energy Regulatory

Commission cited the *Rowan* decision with approval. *United Gas Pipe Line Co.*, Docket Nos. RP71-29 et al. (Phase III) (August 9, 1978) at pp. 13, 15.

Arkla on pages 8 and 9, footnote 3, for obvious reasons barely acknowledges that the Federal Power Commission in "*Arkansas Louisiana Gas Company* v. *Frank J. Hall, et al.*, FPC Docket No. RI76-28," expressly rejected Arkla's same erroneous theory of exclusive Commission jurisdiction over the subject contract issues in this case. The Federal Power Commission by means of a series of orders issued beginning March 8, 1976, through January 7, 1977, consistently denied Arkla's "Petition for Declaratory Order" and consistently deferred the legal and contractual issues to the Louisiana state courts for resolution and adjudication under applicable and well established rules and principles of contract law. Specifically, the Federal Power Commission in relying upon the applicable and controlling decisions of this Court, other courts of this nation, and its own *Rowan* policy, consistently held that:

1. *Order Denying Petition—Issued March 8, 1976:*

> "Arkansas Louisiana Gas Company (Arkla) on September 11, 1975, filed a petition for a declaratory order in the above-entitled proceeding contending that the 'favored nations' clause in the January 11, 1952 contract with Frank J. Hall, et al. (Respondents) was not triggered by certain royalty payments made to the United States Government by Arkla. . . .
>
> The circumstances of the dispute between Arkla and Respondents do not call for any different result than that reached in the Pan American case, supra, or the Rowan case, supra. This case presents a question of concurrent jurisdiction, not primary or exclusive jurisdiction. The Commission has jurisdiction over rates, filing and notice as to both Arkla and Respondents. While this Commission has jurisdiction to decide the subject contract question, the Louisiana court also has jurisdiction over an action based upon asserted breach of contract. Accordingly, we believe it appropriate to defer to the court to decide these contract questions.
>
> For the reasons set forth above, Arkla's petition for declaratory order filed on September 11, 1975 in the above-entitled proceeding is denied."

2. *Order Denying Application for Rehearing—Issued June 4, 1976:*

> "On April 6, 1976, Arkansas Louisiana Gas Company (ARKLA) filed an application for rehearing of the Commission's order issued March 8, 1976, Denying ARKLA's Petition For A Declaratory Order in the above-entitled proceeding. ARKLA had sought a determination that the 'favored nation' clause in its January 11, 1952, contract with Frank J. Hall, et al. (Respondents) was not triggered by certain royalty payments made to the United States Government by ARKLA. We held in the April 6 (sic) [March 8] order that we would defer to the Court to decide this contract issue. . . .
>
> The Commission's order issued April 6, 1976, (sic) [March 8, 1976] fully discussed the Commission's jurisdiction over this contract dispute. ARKLA has presented no new facts or issues of law on that subject. Therefore, the Commission will continue to defer to the Court to decide this dispute."

3. *Order Clarifying and Amplifying Commission Order Denying Application for Rehearing—Issued November 8, 1976:*

> "On June 30, 1976, Frank J. Hall, et al. (Respondents) filed a Petition for Clarification and Ampli-

fication of the Commission's order dated June 4, 1976, whereby the Commission denied Arkansas Louisiana Gas Company's (ARKLA) petition for rehearing. On July 6, 1976, ARKLA filed a Limited Application for Rehearing, or, in the Alternative, Clarification, of the Commission's June 4 order.

ARKLA originally had sought a determination that the 'favored nations' clause in its January 11, 1952 contract with Respondents was not triggered by certain royalty payments made to the United States Government by ARKLA. We held in our order issued March 8, 1976, that we would defer to the court to decide this contract issue.

Respondents request amplification of the Commission's order issued June 4, 1976, in regard to the maximum rates, for each year beginning in the fall of 1961 through the year 1972 which, if contractually authorized and if proper filing procedures had been followed, would have been approved by the Commission pursuant to its '*Other Southwest Area Rate*' Opinion Nos. 607 and 607-A. The respective area base rate ceilings for sales of natural gas under Opinion Nos. 607 and 607-A from Northern Louisiana by a producer with contractual authority who properly filed are:

Prior to January 1, 1965	From January 1, 1965 Thru September 30, 1968	From October 1, 1968 thru 1972
16.7¢ per Mcf at 15.025 psia	18.6¢ per Mcf at 15.025 psia	20.6¢ per Mcf at 15.025 psia

Where, as here, the sale contract provides for the sale of natural gas at the wellhead, the ceilings set forth above for such sale are subject to a 1.0¢ per Mcf downward adjustment for wellhead delivery.

Respondents also request that the Commission set forth and state:

'I. That the Federal Power Commission pursuant to the Natural Gas Act, has not, since September, 1961 to the present date, regulated, limited or restricted the rates or prices which the respondents herein, if contractually authorized, could and should have been paid for their liquid hydrocarbons, gasoline, and plant products extracted from the wet or casinghead gas and which were sold to Arkansas Louisiana Gas Company pursuant to the January 11, 1952 'Most Favored Nation' contract and the related Arkansas Louisiana Gas Company division order contracts.'

While the Commission has jurisdiction over natural gas containing *liquefiable* hydrocarbons, it has no jurisdiction over liquids after their removal from the gas stream. Consequently, if a contract provides for severable payments for the natural gas, including the liquefiable hydrocarbons contained therein, and the subsequently removed liquids, we would have jurisdiction over the sale of the natural gas containing the liquefiable hydrocarbons, but no jurisdiction over the sale of the liquids. *But, there is a basic contract question presented with respect to the subject sale as to whether respondents are entitled under their sales contract to a price for the products removed by ARKLA from the natural gas purchased from respondents which is severable from the price for natural gas sold under such contract. Since, as we indicated in our order issued March 8, 1976, herein, it is appropriate for a court to resolve contract questions pertaining to the sale of natural gas, it is clear that a court would also have jurisdiction to decide this contractual issue. . . .*

The Commission's Order Denying Application for Rehearing issued June 4, 1976, in the above-entitled docket number, is hereby clarified and amplified as set forth in the body of this order." (emphasis added)

4. *Order Denying Applications for Rehearing—Issued January 7, 1977:*

> "On December 8, 1976, Arkansas Louisiana Gas Company (Arkla) filed an application for rehearing of the Commission's order issued November 8, 1976, in the above-entitled proceedings. That order clarified and amplified the Commission order issued June 4, 1976, whereby the Commission denied Arkla's petition for rehearing.
>
> Arkla originally had sought a determination that the 'favored nations' clause in its January 11, 1952, contract with Frank J. Hall, et al. (Respondents) was not triggered by certain royalty payments made to the United States Government by Arkla. We held in our order issued March 8, 1976, that we would defer to the court to decide this contract issue. . . .
>
> Arkla's application for rehearing presents no facts or legal principles that would warrant any change in or modification of the Commission's order issued November 8, 1976.
>
> The application for rehearing filed by Arkla on December 8, 1976, is hereby denied."

Arkla in other desperate efforts to escape the jurisdiction, power, and authority of the Louisiana courts over the subject legal and contractual dispute also attempted to remove Respondents' action for damages for breach of contract and its own "Petition-in-Reconvention for a Declaratory Judgment" as initially filed with the Louisiana state district court to the United States District Court for the Western District of Louisiana by means of a "Petition for Removal" as filed in that certain proceeding "Frank J. Hall, et al v. Arkansas Louisiana Gas Company," CA 75-1168. The United States District Court for the Western District

of Louisiana pursuant to Respondents' "Motion for Remand," this Court's applicable and controlling decisions in *Skelly Oil Co.* v. *Phillips Petroleum Co., supra, Pan American Petroleum Corp.* v. *Superior Court, supra,* and 28 U.S.C. § 1447(c), (d), correctly remanded, by virtue of a "Judgment of Remand" dated February 2, 1976, Respondents' action for damages for breach of contract and Arkla's "Petition-in-Reconvention for a Declaratory Judgment" to the Louisiana state district court for resolution and adjudication under applicable Louisiana state contract law in light of the fact that said legal and contractual dispute "arose under" applicable state contract law. Specifically, the United States District Court for the Western District of Louisiana in rejecting Arkla's "Petition for Removal" as based upon its same erroneous premise that Respondents' action for damages for breach of contract and Arkla's "Petition-in-Reconvention for a Declaratory Judgment" "arose under" federal law, not state contract law, expressly held that:

> *"This suit was filed in Louisiana State Court seeking damages for alleged breach of contract. . . .*
>
> *This claim is clearly merely a claim for breach of a contract, and would be determined by state law. . . .*
>
> Stated in simplest form, the plaintiffs' arguments in the Second Petition are:
>
> 1. Plaintiffs and defendant have a contract under state law.
> 2. Defendant has violated the contract.
> 3. Plaintiffs may recover under state law.
> 4. This claim is not affected by federal law.
> 5. If it is, the plaintiffs still have a claim.

The plaintiffs' claim that they have the status of small producers is not an essential element of their cause of action. See Gully v. *First National Bank, 1936, 299 U.S. 109, 57 S.Ct. 96, 81 L.Ed. 70. . .*

See Eastern Petroleum Co. v. *Kerr-McGee Corp., 7th Cir. 1971, 447 F.2d 569, where a case involving similar issues was removed to federal court on the ground of diversity but state law was applied. The jurisprudence relied upon the motion for reconsideration indicates the correctness of the remand. . . .*

Accordingly the case is REMANDED to the First Judicial District Court, Parish of Caddo, State of Louisiana, defendant to bear all costs. . .

The stay order is vacated, and the remand to state court shall take effect without further orders." (emphasis added)

Arkla's contention that the Louisiana courts below erred in failing to refer to the Federal Power Commission the interpretation of the "favored nations" provision of the subject contract is wholly erroneous and nonsensical in light of the decisions of this Court and the fact that both the Federal Power Commission and the United States district court as federal tribunals deferred and remanded the legal and contractual issues as presented in this case to the jurisdiction of the Louisiana courts for final resolution and adjudication under applicable rules of contract law.

Arkla's additional assertion that even if the Louisiana courts below did have the jurisdiction to interpret the contract, they did not correctly construe and interpret the "favored nations" clause in the subject contract according to the true intent of the parties in light of the evidence in this case is wholly without merit. Limitation of time and space do not permit a

thorough analysis of the sworn testimony of all of the witnesses who testified at the trial of this case and of all of the documentary evidence, but suffice it to say, as evidenced by the opinions of the district court and court of appeal below and their factual findings as to the intent of the parties, these factual findings are fully supported by the overwhelming evidence in the record in this case. Even Arkla's own officers and officials conceded under oath that the prices as paid by Arkla for Respondents' and the Government's royalty gas and working interest gas as produced from the same Sligo Field during the same time are "comparable" within the meaning and intent of the subject "favored nations" clause.

B. Quantum of Damages.

As correctly noted by the Oklahoma Supreme Court in the case of *Western Natural Gas Co.* v. *Cities Service Gas Co., supra,* 507 P.2d at 1249:

> ". . . there is nothing speculative in the assertion that damage results when a producer's contractual opportunity to sell his gas at a higher price per mcf is defeated."

Arkla, as Respondents' contractual obligor under the subject contract, by continuously breaching and violating their contractual rights for fourteen years and by "evasively," "uncooperatively," and "not commendably" withholding and concealing the true facts from Respondents for fourteen years, has frustrated, obstructed, defeated, and destroyed Respondents' contractual rights and legal opportunities to timely obtain their "contractually authorized prices" for their liquefiable hydrocarbons, extracted plant products, and dry or residue gas as sold to Arkla under

the subject contract during the past fourteen years in a manner consistent with all applicable laws, rules, and regulations.

In finally and definitively resolving the quantum of damages issue in the instant case, the Louisiana Supreme Court will, of course, have to take into consideration and determine what the Respondents herein would have received as contractually authorized and consistent with all applicable laws, rules, and regulations for their liquefiable hydrocarbons, extracted plant products, and dry or residue gas as sold to Arkla under the subject contract *had* Arkla timely, properly, cooperatively, and in good faith honored the contract, truthfully disclosed the relevant and material facts and cooperatively done everything necessary to fully implement and effectuate Respondents' contractual rights consistent with all applicable laws, rules, and regulations for the past fourteen years. Consistent with the decisions of this Court in *Albemarle Paper Co.* v. *Moody,* 422 U.S. 405 (1975); *Eastman Kodak Co.* v. *Southern Photo Materials Co.,* 273 U.S. 359 (1926); and *Story Parchment Co.* v. *Paterson Parchment Paper Co.,* 282 U.S. 555 (1931), the Louisiana Supreme Court in the final analysis must compute and determine the recoverable damages and reparations in this case based upon the actual losses and injuries that Respondents sustained and incurred because Arkla breached their contractual rights for fourteen years and prevented and precluded the timely implementation and enforcement of same by "evasively" and "uncooperatively" withholding and concealing the true facts from Respondents for fourteen years. As to the proper

measure of damages for the breach of a contractual obligation, applicable contract law is succinctly summarized and set forth in 3 *Williston on Sales,* § 599, p. 293; *McCormick on Damages,* § 137, p. 560; *Friedman Iron & Supply Co.* v. *J. B. Beaird Co.,* 222 La. 627, 63 So.2d 144 (1953), and Articles 1926, 1927, 1930, 1934, 1943, and 2040 of the Louisiana Civil Code. The formula which will need to be employed by the Louisiana Supreme Court in resolving the quantum of damages issue in this case will be similar to that employed by the courts in *Western Natural Gas Co.* v. *Cities Service Gas Co.,* 507 P.2d 1236 (Okla. 1972), *appeal dismissed* and *certiorari denied,* 409 U.S. 1052 (1972); *Eastern Petroleum Co.* v. *Kerr-McGee Corp.,* 447 F.2d 569 (7th Cir. 1971); *Louisiana-Nevada Transit Co.* v. *Woods,* 393 F. Supp. 177 (W.D. Ark. 1975), as *affirmed* by United States Court of Appeals for the Eighth Circuit in a per curiam opinion on March 15, 1976; and *Cities Service Gas Co.* v. *FPC,* 535 F.2d 1278 (D.C. Cir. 1976).

While Arkla complains as to the quantum of damages as awarded by the Louisiana district court and the damages that the Louisiana Supreme Court may in the future award, Arkla has heretofore consistently computed, calculated, represented, and conceded that the Respondents' recoverable damages and reparations in this case, if Respondents were successful in proving Arkla's continued breach of contract for fourteen years, would "in the instant case" not exceed "more than $3,500,000." (App. 1a-3a.) Arkla prior to the filing of its petition in the instant proceeding has consistently represented, disclosed, and conceded to the Securities

and Exchange Commission and to the Louisiana courts below that:

1. *August 19, 1975*—Arkla in a public filing with the federal Securities and Exchange Commission disclosed and revealed its *own* independent calculation, computation and assessment of Respondents' recoverable compensatory damages in the instant case:

> "The suit asked for a declaratory judgment, an accounting, and unspecified damages in the amount of $1.5 million. . . . The amended petition appears to be for the same demand and on the same legal and factual basis as to the plaintiffs' claims, but instead of asking for an accounting, seeks damages for breach of the contract in an amount of $8,755,000 and cancellation of the contract. . . . It should also be stated that plaintiffs' demand, if they should prevail on their principal claim, is estimated by the Company to be not more than $3,500,000.
>
> The reason this lawsuit was not reported in the prospectus is that, in our opinion, it is not 'material' in the sense in which the Commission uses that term in its rules with regard to the preparation of prospectuses. . . .
>
> We have no objection to describing the lawsuit in the prospectus but since it is an action of the kind normally experienced in the business in which the Company is engaged, and it appears that a complete loss of the suit would not materially affect the Company or its prospects, we concluded that it should not be described in the prospectus."

2. *March 19, 1976*—Arkla in its Report Form 10-K (P-193) as filed with the federal Securities and Exchange Commission again candidly asserted and correctly disclosed its true and independent posi-

tion with respect to Respondents' recoverable damages in the instant lawsuit:

> "The Company in the last two or three years has experienced litigation involving several of its gas purchase contracts, arising basically from the difference between earlier and current prices for gas under producer sales. No one of these legal actions is material as that term is generally defined. *Some of these have been settled, settlement of others is expected and at least one involving a claim estimated at a maximum of $3.5 million is still pending.*" (Emphasis added)

3. *April, 1976*—Arkla in its sworn written answers to some of Respondents' written interrogatories as filed in the instant case with respect to Respondents' recoverable losses and damages judicially admitted and again conceded that:

> "The lawsuit referred to in Item 5 of defendant's Form 10-K filed March 1976 as 'one involving a claim estimated at a maximum of $3.5 million' is the present lawsuit." See P-194.
>
> "The material included in the report at Item 5 was prepared by the defendant's attorneys Gilbert L. Hetherwick and Robert Roberts, Jr." See P-195.
>
> "Insofar as Item 5 of defendant's Form 10-K, referred to in Interrogatory No. 11, is concerned, defendant's attorney Robert Roberts, Jr. made the estimate of the maximum amount which, if plaintiffs were wholly successful in their suit, might be recovered in the suit." See P-196.

Clearly, Arkla's consistent computations, calculations, and estimates of Respondents' recoverable damages in the instant case took into consideration, as the Louisiana Supreme Court must likewise do, what the

Respondents herein could and would have received as contractually authorized for their liquefiable hydrocarbons, extracted plant products, and dry or residue gas as sold to Arkla under the subject contract in a manner consistent with all applicable laws, rules, and regulations *had* Arkla not continuously breached and violated the subject contract for fourteen years and *had* Arkla not obstructed, frustrated, hindered, and prevented the timely performance and implementation of Respondents' contractual rights in a manner consistent with all applicable laws, rules, and regulations for fourteen years. Certainly, Arkla should not be heard to complain on the quantum of damages issue unless the Louisiana Supreme Court in measuring Respondents' recoverable damages exceeds the calculations and estimates as consistently and presumably correctly made by Arkla in connection with the instant case.

In conjunction with Arkla's different analysis of the quantum of damages issue as set forth in its petition herein, Arkla now asserts that the Louisiana Supreme Court might in computing Respondents' recoverable damages possibly consider price levels in connection with dry or residue gas that could exceed the maximum, just, and reasonable rate ceilings that were previously established and approved for the area that includes the Sligo Gas Field by the Federal Power Commission in its Opinion Nos. 607 and 607-A. 46 F.P.C. 900 (1971); 47 F.P.C. 99 (1972). In that the prices as paid for the Government's royalty gas in the Sligo Gas Field during the subject period of time were consistently and substantially *below* the Federal Power Commission's approved maximum area rate ceilings, Respondents' contractually authorized prices for their dry or residue gas as based upon the Government's prices, which Respondents did not receive and were not able to obtain because Arkla elected to breach the contract for fourteen years and to "evasively" and "uncooperatively" withhold and conceal the true facts from Respondents for fourteen years, of necessity could not and did not exceed the Federal Power Commission's estblished and approved maximum, just, and reasonable area rate ceilings. There is no dispute or controversy as to the existence and extent of the Federal Power Commission's maximum, just, and reasonable area rate celings. Moreover, there is no dispute as to the fact that the contractually authorized prices, which Respondents should and would have received for their liquefiable hydrocarbons and extracted plant products *had* Arkla *not* breached the contract and *had* Arkla *not* successfully withheld and concealed the true facts from Respondents for fourteen years, were *not* subject to any of the Federal Power Commission's maximum rate ceilings. Again, it will be the task and duty of the Louisiana Supreme Court to fix and limit the recoverable damages that Respondents are justly entitled to in this case to a sum that places Respondents in the same or at least as good a position that Respondents could and would have been in *had* Arkla *not* breached the contract for fourteen years and *had* Arkla *not* successfully withheld the true facts from Respondents for fourteen years.

In that Arkla was unable to even in theory create any real or substantial federal issues in connection with the lower courts' interpretation of the subject contract and the computation of recoverable damages, Arkla in its petition attempts to create a dispute as to Respondents' small producer status, when in fact there is no real dispute. Prior to the commencement of the in-

stant lawsuit in the Louisiana courts, Respondents were certified as small producers by the Federal Power Commission as of October 10, 1972 (FPC Docket No. CS73-323), and Arkla consistently and properly recognized Respondents' status as small producers. Arkla in order to attempt to create some federal issue before the Federal Power Commission in the proceedings referred to in its petition at 8 n.3 raised the question before the Federal Power Commission as to which Respondents were covered in connection with the above-referenced certificate. The Commission in its order dated November 8, 1976, confirmed the status of all of the Respondents herein as small producers. Even under Arkla's analysis, the status of Respondents as small producers is pertinent, if at all, only to the quantum of damages issue which is presently pending before the Louisiana Supreme Court and is not explained at all in Arkla's petition. The Louisiana Supreme Court will, of course, have to determine the extent to which Arkla injured and damaged Respondents prior to the time Respondents attained the administrative classification of small producers by breaching and violating their contractual rights and successfully withholding and concealing the true, relevant, and material facts necessary for the implementation and enforcement of Respondents' contractual rights consistent with all applicable laws, rules, and regulations. Arkla's contention that the Louisiana Supreme Court will not correctly "adhere to the provisions of the Natural Gas Act and the pertinent regulations of the FERC in its determination of damages" is terribly unfair and premature. Until the Louisiana Supreme Court acts on the quantum of damages issue, there is not even a record against which this contention can be judged and there is no

reason whatever to assume that the Louisiana Supreme Court will not properly compute and calculate the recoverable losses and damages in this case consistent with Arkla's own calculations, computations, and estimates of Respondents' recoverable losses and damages in the instant case.

CONCLUSION

For the foregoing reasons, Arkla's petition should be denied.

Respectfully submitted,

JAMES FLEET HOWELL
WIENER, WEISS, MADISON & HOWELL
411 CNB Building
Shreveport, Louisiana 71101

Attorney for Respondents

January 1979

APPENDIX

APPENDIX A

BLANCHARD, WALKER, O'QUIN & ROBERTS
FIRST NATIONAL BANK BUILDING
POST OFFICE DRAWER 1120
SHREVEPORT, LOUISIANA 71163
TELEPHONE (318) 221-6858

August 19, 1975

AIR MAIL

Securities and Exchange Commission
Attention: Mr. Blair Corkran
Division of Corporation Finance
Washington, D. C. 20549

RE: Arkansas Louisiana Gas Company,
Registration No. 2-54218, Form S-9

Dear Sirs:

This is in response to telephone conversation on Monday, August 18, yesterday, between Mr. Corkran and the undersigned as attorney for Arkansas Louisiana Gas Company. Mr. Corkran inquired as to whether the pending lawsuit of Frank J. Hall and fourteen other plaintiffs against Arkansas Louisiana Gas Company (the "Company"), No. 225,699 on the docket of the First Judicial District Court of Louisiana within and for the Parish of Caddo, should be described in the preliminary prospectus dated July 21, 1975, a part of the above registration, under the caption "Legal Proceedings" on page 19.

The suit referred to was filed in the First District Court, Caddo Parish, in October 1974, by fifteen plaintiffs, against the Company. The plaintiffs brought the suit on a contract between them (or in certain instances their predecessors) with a number of other sellers not party to the suit and the Company for the sale of gas to be produced from certain

gas production properties in the Sligo Gas Field, Bossier Parish, Louisiana. The contract was executed in January, 1952, and its term extends into 1980. The suit claimed that the agreed prices under the contract, by reason of payments made by the Company to the Federal Government under an oil and gas lease, beginning in 1961 were increased and had not been properly paid by the Company. The suit asked for a declaratory judgment, an accounting, and unspecified damages in the amount of $1.5 million. The defendant answered the suit denying plaintiffs' version of the agreement and claiming that the prices to the plaintiffs had been properly calculated and paid. After extensive preliminary proceedings, the plaintiffs on June 12, 1975 superseded their original demand with an amended petition on which the action is now pending. The amended petition appears to be for the same demand and on the same legal and factual basis as to the plaintiffs' claim, but instead of asking for an accounting, seeks damages for breach of the contract in an amount of $8,755,000 and cancellation of the contract. The Company believes that it has paid plaintiffs all sums due under the contract and expects to prevail on the principal issue of the suit. In addition, there are a number of other issues, the decision of which will be material if plaintiffs should prevail on their claim; for example, prescription (limitation), whether the Federal Power Commission has sole jurisdiction over plaintiffs' demand, the effect on the agreement and its interpretation and performance of the Natural Gas Act and the Federal Power Commission's regulations thereunder. It should also be stated that plaintiffs' demand, if they should prevail on their principal claim, is estimated by the Company to be not more than $3,500,000.

The reason this lawsuit was not reported in the prospectus is that, in our opinion, it is not "material" in the sense in which the Commission uses that term in its rules with regard to the preparation of prospectuses. If the entire eight million dollar claim should be considered at issue in

the suit, it would affect earnings by additional gas purchase expense with an offset to the extent of 50% by reducing income taxes, and, as we understand the proper accounting, the additional expense would be spread over the fourteen years back to 1961. If the entire amount at risk in the suit should be considered as affecting the year in which a judgment might become final, the risk, $4,377,000, would be barely more than 10% of the net income of the Company for the year ending May 31, 1975, as reported in the prospectus, and could be compared also with the income from continuing operations before income taxes (58.60 million dollars), and with the income from continuing operations (39.24 million dollars). The amount claimed is obviously less than 10% of current assets and less than 5% of total assets—tests of materiality which are mentioned in certain of the Commission's rules. The annual reduction in income would be in the order of $315,000.

We have no objection to describing the lawsuit in the prospectus; but since it is an action of the kind normally experienced in the business in which the Company is engaged, and it appears that a complete loss of the suit would not materially affect the Company or its prospects, we concluded that it should not be described in the prospectus.

We would be glad to have your conclusions on this point.

Very truly yours,

/s/ Robert Roberts, Jr.

Blanchard, Walker, O'Quin & Roberts

RRJr/er

cc: Eugene R. Sullivan, Esq.
David G. Ormsby, Esq.

APPENDIX B

ARKANSAS LOUISIANA GAS COMPANY
COMPANY

INTERNAL CORRESPONDENCE

DATED AT Shreveport, Louisiana
November 20, 1961

TO: Mr. J. C. Templeton

FROM: B. E. Harrell

SUBJECT: U.S.A. Lease—Sligo

In answer to your letter of November 17, 1961, concerning royalty price applicable to the above lease, this is to advise that I have no particular opinion as to what price should be paid to royalty owners by ALG in this field. However, I do wish to caution you that we have a favored nations contract with W. E. Hall et al in this field and the price they are receiving is presently $0.08797 per MCF. I do not know whether our paying any royalty owner a higher price than $0.08797 would activate this favored nations clause; however, if the attorneys feel that there is no danger of a royalty price activating a favored nations clause, then I have no objection to paying the Government at a price substantially higher than $0.08797.

I wanted to bring this out, however, since any activation of favored nations clauses in this area would cost ALG several million dollars increase in cost of gas annually.

/s/ BILL

BEH:dm

cc: Mr. D. W. Weir
Mr. Robert Roberts, Jr.

APPENDIX C

ARKANSAS LOUISIANA GAS COMPANY
COMPANY

INTERNAL CORRESPONDENCE

DATED AT December 27, 1961.

TO: Mr. John W. Denhollem

FROM: Robert Roberts, Jr.

SUBJECT: Operating Agreement—Barksdale Field
Lease, Sligo Area, Bossier Parish, Louisiana

This is in response to your memorandum of December 18, 1961, requesting my comment on recent correspondence concerning the effort to agree on a balancing provision (Section 3) for the Operating Agreement of February 1, 1961.

After our telephone conversation yesterday I find that in my file is a copy of the amendment submitted by Mississippi River Fuel Corporation with their letter of June 14, 1961. Shortly afterward I commented on Mississippi River's draft and send you herewith a copy of my memorandum to you of July 25th in that connection. I do not know that there is anything that I can add to the comments I made in that letter.

Texas Gas' letter of December 13th emphasizes the difficulty of the problem and the difference in point of view of the various parties: You do not want to buy any gas or set a price, and obviously several of the parties want to do just that.

As requested, your file is returned herewith.

Very truly yours,

/s/ Robert Roberts, Jr.

Encs-
RRJr:m

cc—Messrs. J. C. Templeton
M. C. Bubenzer
J. O. Cooke, Jr.

APPENDIX D

United States Government
Memorandum

TO: Files DATE: 10-22-62

FROM: N. Orvis Frederick

SUBJECT: BLM-A-054491, Sligo field, Louisiana

J. C. Templeton, Vice President, Arkansas-Louisiana Gas Company, Shreveport, came in at 9:30 on Friday, October 19, 1962, to discuss the $34,723.45 deficit (as of 8-1-62) in royalty payments, mostly due to their 8.547¢ per MCF value placed on gas taken in kind being below reasonable value and below/all sales from the same lease by their co-lessees.

Mr. Templeton is aware of the higher prices being paid for 85% of the gas from this lease, but maintained Ark-La is buying a great deal of gas from other producers in the field at the 8.5¢+/MCF price by 1952 contracts (referred to in his letter to us dated 4-13-62); feared the other producers would be dissatisfied if Ark-La paid us more; and suggested a negotiated price. He was advised that these were unacceptable; that royalty would continue to be computed on the Union Producing Company price (our letter of 3-27-62) and in accordance with the lease instrument and regulations; and that Ark-La had the right of appeal.

He expressed little interest in an appeal but wished to have time to consult their attorney, who will be back from vacation in about a week, and then present the matter to the Company board (!), and that we would hear further from him in 10 to 14 days. It seemed most likely that Ark-La will agree to recalculate their royalty payments in agreement with our royalty statements.

/s/ N. Orvis Frederick
N. Orvis Frederick

Copy to Shreveport
NOF:ec

APPENDIX E

ARKANSAS LOUISIANA GAS COMPANY
COMPANY
INTERNAL CORRESPONDENCE

DATED AT Shreveport, Louisiana
January 17, 1974

To: Mr. Jim Monk

FROM: Gilbert L. Hetherwick

SUBJECT: D. B. McConnell, *et al*
Sligo Field, Louisiana

Attached is a draft of a letter responding to Will Hall's letter of January 11, 1974, in accordance with your request of January 15, 1974.

I drafted this response like you requested to simply state that we are not paying a higher price than the price in his contract. However, that is not what he asked for. He asked for specific information concerning all contracts in the Sligo Field and particularly information concerning the price we are paying the United States Government (see page 2 of his letter).

I assume from your request that you meant to deliberately not give him what he had asked for. However, I would point out that Will Hall is a lawyer and our response looks like we may be putting him off. All he has to do is draft a petition and file it in order to sue us and then he can subpoena all the contracts he wants information about. This would be troublesome and probably expensive for Arkla and I would suggest that you would consider giving him more specifically the information he asks for unless there is some reason not to.

Your file is returned herewith.

Very truly yours,

/s/ G.L.H.

GLH/fm

Attachments

APPENDIX F

No. 41,599

TWENTY-SIXTH JUDICIAL DISTRICT COURT
OF LOUISIANA
IN AND FOR THE PARISH OF BOSSIER

FRANK J. HALL, ET AL.

v.

ARKANSAS LOUISIANA GAS COMPANY

DECLINATORY EXCEPTION OF IMPROPER VENUE

NOW INTO COURT, through undersigned counsel, comes the defendant, ARKANSAS LOUISIANA GAS COMPANY, appearing solely for the purpose of this exception, and excepts to plaintiffs' petition on the following grounds:

The venue in which this suit is filed is improper because exceptor is a Delaware corporation which is licensed to do business in this state and has its principal place of business in Louisiana, in Caddo Parish. As disclosed by plaintiffs' petition, this suit is based upon an alleged breach of contract by defendant and therefore does not fall within any of the exceptions provided in the Code of Civil Procedure to the general rule that a foreign corporation licensed to do business in this state shall be sued in the Parish where its principal business establishment in this state is located.

WHEREFORE, defendant prays that this exception be maintained and that there be judgment herein in favor of defendant and against plaintiffs, and that plaintiffs' demand be dismissed at their cost.

BLANCHARD, WALKER, O'QUIN & ROBERTS

By /s/ NEILSON S. JACOBS
Neilson S. Jacobs

By /s/ CLYDE W. THURMON
Clyde W. Thurmon
Fifth Floor, First National Bank Building,
Post Office Drawer 1126,
Shreveport, Louisiana 71163

Attorneys for Defendant

FILED: September 6, 1974

APPENDIX G

NUMBER 225,699

FIRST JUDICIAL DISTRICT COURT OF LOUISIANA
IN AND FOR THE PARISH OF CADDO

FRANK J. HALL, ET AL.

v.

ARKANSAS LOUISIANA GAS COMPANY

RECONVENTIONAL DEMAND OF
ARKANSAS LOUISIANA GAS COMPANY,
DEFENDANT IN THE PRINCIPAL ACTION

The petition in reconvention of ARKANSAS LOUISIANA GAS COMPANY, defendant in the principal actions in this suit, herein sometimes referred to as "Arkla," with respect represents that:

1.

This action is brought by Arkla against the plaintiffs in the principal suit, namely:

FRANK J. HALL, a resident of Caddo Parish, Louisiana;

W. E. HALL, JR., a resident of Beauregard Parish, Louisiana;

MRS. W. E. HALL, SR., a resident of Caddo Parish, Louisiana;

THE H. M. HARRELL TESTAMENTARY TRUST, represented by Mr. Carlyle W. Urban, Testamentary Trustee;

JAMES E. HARRELL, a resident of Houston, Texas;

JOHN K. HARRELL, SR., a resident of Utopia, Texas;

ASA BENTON ALLEN, a resident of Dover, Massachusetts;

SIDNEY G. MYERS, JR., a resident of Caddo Parish, Louisiana;

W. O. COCHRAN, a resident of Bossier Parish, Louisiana;

THOMAS F. PHILYAW, a resident of Caddo Parish, Louisiana;

MRS. ELAINE ALLEN, a resident of Winnfield, Louisiana;

JAMES A. NOE, a resident of Monroe, Ouachita Parish, Louisiana;

D. B. MCCONNELL, a resident of Shreveport, Caddo Parish, Louisiana;

MRS. ELVA L. WEISS, a resident of New Orleans, Orleans Parish, Louisiana; and

SOL KAPLAN and the NATIONAL AMERICAN BANK, New Orleans, Co-Testamentary Executors of the SUCCESSION OF SEYMOUR WEISS, Docket No. 498-163, Parish of Orleans, State of Louisiana;

referred to herein as defendants in reconvention.

2.

Arkla's object in the suit is to obtain a judgment and decree declaring its rights against defendants in reconvention, for the past and for the future, with respect to the contract, hereinafter described and referred to, between Arkla and defendants in reconvention, with particular reference to the effect of Arkla's payments of royalties to its lessors under oil and gas leases covering lands in the Sligo Gas Field, Bossier Parish, Louisiana; and to resolve the dispute, hereinafter described, which has arisen between Arkla and defendants in reconvention with respect to the application of that contract to the facts hereinafter alleged.

3.

On or about January 11, 1952, Arkla and defendants in reconvention, or their predecessors, together with other persons, entered into a written agreement providing for the purchase by Arkla from the other parties to the contract of natural gas produced in the Sligo Gas Field, Bossier Parish, Louisiana; a copy of that contract (herein referred to as the "Agreement") is attached to plaintiffs' original petition in this suit, was admitted by Arkla's answer, and is now incorporated by reference in this petition in reconvention.

4.

In early 1961 Arkla acquired by assignment from Union Producing Company, the original lessee, an undivided 15% interest in and to a certain oil, gas and mineral lease from the United States of America to Union Producing Company covering lands described as Sections 1, 2, 3 and 4, Township 17 North, Range 12 West, Louisiana Meridian (called "Parcel No. 3"), the lease being identified on the records of the Department of the Interior of the United States, which has administration thereof, as Lease Serial BLM-A-054491 (Louisiana). A copy of this lease, which is hereinafter sometimes referred to as the "Government lease," and which affects lands in the Sligo Gas Field, Bossier Parish, Louisiana, is attached to and made part of this petition in reconvention as Exhibit A.

5.

Arkla and its co-owners of the Government lease have developed the lands subject thereto for production of minerals and since a time in 1961 have produced from wells on the land substantial quantities of natural gas containing condensate and other hydrocarbon liquids.

6.

Arkla owns and operates a gas gathering system and a natural gasoline extraction plant in the Sligo Field and

area, and owns and operates trunk pipelines connected with the outlet of its gasoline plant and used for transporting processed gas ("residue gas") therefrom to its general pipeline system from which gas is distributed and sold in various places in North Louisiana, East Texas, Arkansas and Oklahoma.

7.

Arkla takes in kind at or near separators at the wells all of its 15% share of the gas produced from the wells on lands covered by the Government lease; previous to Arkla's receipt of the gas, it has been processed through separators which remove the readily condensable liquids and this condensate is sold by the lease operator (MRT Exploration Company) for the account of the owners of the lease, including Arkla. Arkla takes no gas produced on lands covered by the Government lease other than its 15% share of the production; the balance is taken by or for the account of its co-owners of the lease.

8.

Arkla's 15% share of the gas produced from the wells on the Government lease, after receipt by it as described in the preceding paragraph, is taken through Arkla's gathering system to its gasoline plant where the condensable hydrocarbon liquids are extracted; this process reduces to some extent the volume of the gas and requires a certain amount of the incoming stream for fuel to operate the extraction plant. At the outlet of the gasoline plant the residue gas is placed in Arkla's pipeline and transported and sold, as described in Paragraph 6 above.

9.

There has been, since the beginning of production on the Government lease, no substantial change in the physical operation as described in the three preceding paragraphs

of this petition. Under the provisions of the Government lease, the lessor, the United States of America, is entitled to a royalty of 16⅔% of the amount or value of production obtained and saved from the leased lands; and under a further provision of the lease, Arkla is obligated "at the option of the lessor to pay the respective royalties herein provided for in value or in amount of production." The lessor, the United States of America, has never exercised its option to require payment of royalties from Arkla under the Government lease in amount of production, and Arkla, beginning with the first royalty payment and continuing without interruption to the present time, has paid to the United States under the lease its share of the royalties due thereunder based on the value of the gas and the gasoline and other products extracted from the gas.

10.

Under the provisions of the Government lease and the Code of Federal Regulations, Title 30, the United States of America, through the Department of the Interior, Geological Survey, expressly reserved the right to "establish reasonable minimum values for purposes of computing royalty on any or all oil, gas, natural gasoline, and other products obtained from gas; due consideration being given to the highest price paid for a part or for a majority of production of like quality in the same field, to the price received by the lessee, to posted prices and to other relevant matters and, whenever appropriate, after notice and opportunity to be heard."

11.

Under the right so reserved by the lessor, as described in the preceding paragraph, the Department of the Interior, by notice in the form of letters to Arkla dated March 27, 1962, December 4, 1973 and May 17, 1974, of which copies are attached to and made part of this petition in reconvention as Exhibits B, C and D, respectively, fixed the following amounts as the value of Arkla's share of the production from the Government lease.

Per MCF of residue gas production, at a pressure base of 15.025 psia	$ 0.117432	Until January 1, 1962
Per MCF of residue gas production, at a pressure base of 15.025 psia	$ 0.130252	Until January 1, 1967
Per MCF of residue gas production, at a pressure base of 15.025 psia	$ 0.140503	After January 1, 1967
Per MCF of residue gas production, at a pressure base of 15.025 psia	$ 0.26	Effective May 1, 1974.

By the letter of December 4, 1973 (Exhibit C), fuel and shrinkage deductions at the Sligo Plant were limited to 4½% of the wet gas volumes received.

12.

Arkla has paid royalties to the United States, under the Government lease, calculated as being 16⅔% of the value of its 15% of the production from the Government lease, determined, as required by the lessor, at the unit values set forth in the preceding paragraph, including value of extracted products at the price at which sold by Arkla. Arkla's royalty payments to the United States under the Government lease in a number of months have exceeded, on the basis of such determined values per unit of gas produced, the price paid by Arkla to defendants in reconvention under the Agreement.

13.

Defendant has made no purchase from any person of gas produced from a well or wells located in the Sligo Gas Field of Bossier Parish since the date of the Agreement at a price higher than is provided by the Agreement to be paid for gas delivered by defendants in reconvention under the Agreement.

14.

Notwithstanding that Arkla's payment of royalties to the United States under the Government lease or to any other parties as royalty on gas produced in the Sligo Gas Field are not, as a matter of law or fact, purchases of gas, defendants in reconvention have brought this suit claiming that because of such royalty settlement or settlements Arkla has incurred substantial liabilities to them as additional price for the gas purchased from them under the Agreement. Arkla is entitled to have put at rest, for past transactions and for the future, the disagreement which exists between defendants in reconvention and Arkla, and which has been asserted in the principal action.

15.

The filing of this reconventional demand will not retard the progress of the principal action, inasmuch as defendants in reconvention are still proceeding, as plaintiffs, in discovery; and Arkla, pending completion of their discovery proceedings, has not yet begun the discovery necessary to its preparations for trial.

WHEREFORE, Arkansas Louisiana Gas Company, plaintiff in reconvention, prays that defendants in reconvention be served with copies of this reconventional demand and that, after trial, there be judgment on this reconventional demand in its favor and against defendants in reconvention, named in paragraph numbered 1 of this petition in reconvention, adjudging and decreeing as follows:

(1) that payments by Arkla to the United States of America, since 1961 to the present, of royalties due by Arkla to the United States under Lease Serial BLM-A-054491 (Louisiana) calculated on the value of oil and gas produced by Arkla from the land covered by said lease, as determined by the United States Department of the Interior, Geological Survey, in fact and in law have been payments of royalty under the lease and have not been payment of the price for the purchase of gas;

(2) that payments of royalties to the United States of America in the manner described in the preceding paragraph (1) will not in the future amount, in fact or in law, to payment of the purchase price for gas and oil; and

(3) that payment by Arkla to third persons of royalties under oil, gas and mineral leases held by Arkla on lands in the Sligo Gas Field, Bossier Parish, Louisiana, where such leases provide for royalty payments based on value of gas produced and have been calculated and paid on that basis by Arkla, have not been in the past, and will not be in the future, payments of the purchase price of gas produced in the Sligo Gas Field, Bossier Parish, Louisiana.

(4) Arkla further prays for all orders and decrees necessary, for costs, and for general and equitable relief.

Shreveport, Louisiana, March 14, 1975.

NEILSON S. JACOBS
MARLIN RISINGER, JR.
ROBERT ROBERTS, JR.

BLANCHARD, WALKER, O'QUIN
& ROBERTS
First National Bank Building
Post Office Drawer 1116
Shreveport, Louisiana 71163

By /s/ ROBERT ROBERTS, JR.
Robert Roberts, Jr.

Attorneys for Defendant and Plaintiff in Reconvention

NUMBER 225,699

FIRST JUDICIAL DISTRICT COURT OF LOUISIANA
IN AND FOR THE PARISH OF CADDO

FRANK J. HALL, ET AL.

V.

ARKANSAS LOUISIANA GAS COMPANY

ORDER

It appearing that the filing of the foregoing reconventional demand will not retard the progress of the principal action, leave is hereby granted for its filing.

Shreveport, Louisiana, March 14, 1975.

/s/ FRED C. SEXTON, JR.
JUDGE, First Judicial District Court
in and for Caddo Parish, Louisiana.

ENDORSED FILED
B. W. SCHULMAN, Deputy Clerk
Mar. 14, 1975

A TRUE COPY—Attest

/s/ B. W. SCHULMAN
DEPUTY CLERK

APPENDIX H

NUMBER 225,699

FIRST JUDICIAL DISTRICT COURT OF LOUISIANA
IN AND FOR THE PARISH OF CADDO

FRANK J. HALL, ET AL.

V.

ARKANSAS LOUISIANA GAS COMPANY

DEFENDANT'S MOTION FOR
SEPARATE TRIAL OF CERTAIN OF
THE ACTIONS CUMULATED IN THIS SUIT

NOW INTO COURT, in the above entitled and numbered cause, by its counsel, comes ARKANSAS LOUISIANA GAS COMPANY, made defendant herein, and respectfully shows:

1.

This motion is filed to request the Court to order separate trials of plaintiffs' action herein for a declaratory judgment and defendant's reconventional demand, on the one hand, and plaintiffs' actions for damages for breach of contract and an accounting, on the other. The grounds of this motion are as follows:

2.

Plaintiffs have cumulated in this suit, as appears from the prayer of their petition, an action for a declaratory judgment (Subdivision II of prayer of petition), an action for damages for breach of contract (Subdivision III of prayer of petition), and an action for an accounting (Subdivision IV of prayer of petition); and defendant has filed herein a reconventional demand seeking a declaration of rights as between plaintiffs and defendant under the contract between them alleged in plaintiffs' petition.

3.

Defendant does not assert that the cumulation of actions existing in this judicial proceeding is improper; but it shows that the evidence necessary for the Court's decision upon the application of the gas sales contract alleged by plaintiffs and admitted by defendants, to the facts with regard to defendant's royalty settlements under the United States Government lease also alleged in plaintiffs' petition, is relatively simple and involves principally legal rather than factual questions. Whereas, plaintiffs' claim for damages and demand for an accounting would involve evidence on, and determinations by the Court as to, the details of each monthly settlement between plaintiffs and defendant since early 1961, and recalculation of the prices in such settlements in accordance with plaintiffs' version of their rights, namely, it would require repricing each monthly settlement of each plaintiff in accordance with royalty settlements under the Government lease.

4.

Only if plaintiffs prevail in their interpretation of their rights under the contract would the monumental accounting described above be necessary. It is obvious that a determination of whether or not defendant is liable for additional prices under the contract, and the measure of that liability, prior to the trial of the accounting here sought, would simplify the proceedings in this cause, would permit a more orderly disposition of the case, and would be otherwise in the interest of justice; and that therefore a separate trial of plaintiffs' request for declaratory relief and defendant's reconventional demand should be ordered by the Court as permitted by Code of Civil Procedure, Articles 465 and 1038.

WHEREFORE, defendant prays that the Court enter an order herein for the separate trial of plaintiffs' demand for a declaratory judgment and defendant's reconventional demand, on the one hand, and of plaintiffs' demand for damages and an accounting, on the other.

For all orders and decrees necessary and for general and equitable relief.

Dated: Shreveport, Louisiana, March 14, 1975.

NEILSON S. JACOBS
MARLIN RISINGER, JR.
ROBERT ROBERTS, JR.

BLANCHARD, WALKER, O'QUIN & ROBERTS
First National Bank Building
Post Office Drawer 1126
Shreveport, Louisiana 71163

By /s/ ROBERT ROBERTS, JR.
Robert Roberts, Jr.

Attorneys for Defendant

CERTIFICATE

I HEREBY CERTIFY that a copy of the above and foregoing motion has this day been served by United States Mail, postage prepaid, upon M. James Fleet Howell, counsel of record for plaintiffs, at his address of record in this proceeding.

Shreveport, Louisiana, March 14, 1975.

/s/ ROBERT ROBERTS, JR.
Robert Roberts, Jr.

Supreme Court, U. S.
FILED
APR 21 1979
MICHAEL RODAK, JR., CLERK

No. 78-986

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

ARKANSAS LOUISIANA GAS COMPANY, *Petitioner,*

v.

FRANK J. HALL, MRS. W. E. HALL, SR., THE H. M. HARRELL TESTAMENTARY TRUST, JAMES E. HARRELL, JOHN K. HARRELL, SR., ASA BENTON ALLEN, SIDNEY G. MYERS, JR., W. O. COCHRAN, THOMAS F. PHILYAW, MRS. ELAINE ALLEN, JAMES A. NOE, D. B. MCCONNELL, MRS. EVA L. WEISS, SOL KAPLAN and NATIONAL AMERICAN BANK, New Orleans, Co-Testamentary Executors of the SUCCESSION OF SEYMOUR WEISS, *Respondents.*

SUPPLEMENTAL BRIEF IN OPPOSITION TO ARKANSAS LOUISIANA GAS COMPANY'S PETITION FOR A WRIT OF CERTIORARI

JAMES FLEET HOWELL
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411 CNB Building
Shreveport, Louisiana 71101
Attorney for Respondents

April 1979

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-986

ARKANSAS LOUISIANA GAS COMPANY, *Petitioner,*

v.

FRANK J. HALL, MRS. W. E. HALL, SR., THE H. M. HARRELL TESTAMENTARY TRUST, JAMES E. HARRELL, JOHN K. HARRELL, SR., ASA BENTON ALLEN, SIDNEY G. MYERS, JR., W. O. COCHRAN, THOMAS F. PHILYAW, MRS. ELAINE ALLEN, JAMES A. NOE, D. B. MCCONNELL, MRS. EVA L. WEISS, SOL KAPLAN and NATIONAL AMERICAN BANK, New Orleans, Co-Testamentary Executors of the SUCCESSION OF SEYMOUR WEISS, *Respondents.*

SUPPLEMENTAL BRIEF IN OPPOSITION TO ARKANSAS LOUISIANA GAS COMPANY'S PETITION FOR A WRIT OF CERTIORARI

PRELIMINARY STATEMENT

At the time ARKANSAS LOUISIANA GAS COMPANY ("Arkla") filed its petition for a writ of certiorari with this Court on December 18, 1978 seeking a review of the factual findings, contractual determinations and damage judgments of the Louisiana district court and the Louisiana court of appeals below, the instant lawsuit involving Respondents' substantive contractual rights and claims for the judicial recovery of compensatory damages and monetary reparations for the actual losses and damages sustained and incurred as a

direct result of Arkla's continued breach and violation of Respondents' private contractual rights for fourteen years and Arkla's wrongful obstruction and prevention of the timely and prospective implementation, effectuation and fulfillment of Respondents' private contractual rights in a manner consistent with the true intent of the contract and all applicable laws, rules and regulations for fourteen years had not been finally decided by the Louisiana Supreme Court, but rather was still pending before the Louisiana Supreme Court for a final judgment. On March 5, 1979, the Louisiana Supreme Court in the case of "*Frank J. Hall, et al.* v. *Arkansas Louisiana Gas Company,* Docket No. 62,560, Supreme Court of Louisiana" by applying well established rules and principles of contract law, equity and justice to the factual determinations as made by that court in light of the overwhelming evidence in this case rendered a final judgment with respect to the legal merits of Respondents' substantive contractual rights under state law to recover monetary damages and reparations in compensation for the actual losses and damages caused by Arkla's continued breach of contract and Arkla's effective withholding and concealment of all of the true facts from Respondents for fourteen years which as found by the Louisiana Supreme Court wrongfully and improperly obstructed, prevented and precluded the timely implementation and prospective fulfillment of Respondents' private contractual rights in a manner consistent with the true intent of the contract and all applicable laws, rules and regulations for fourteen years.[1]

[1] A copy of the Louisiana Supreme Court's final judgment dated March 5, 1979 is attached hereto for the Court's ready reference and review. (Appendix I—pp. 26a-42a) On April 9, 1979 the Louisiana Supreme Court unanimously denied Arkla's "Application For a Rehearing" wherein Arkla had again vigorously challenged and contested the factual findings and contractual determinations of the Louisiana Supreme Court in this case. A copy of the Louisiana Supreme Court's order denying Arkla's "Application For a Rehearing" is attached hereto for this Court's ready reference and review. (App J—p. 43a).

On March 29, 1979, Respondents were served by mail with a copy of Arkla's "Supplemental Brief Addressing Decision of Louisiana Supreme Court" as filed with this Court in this proceeding and in which Arkla purports to address, analyze and dispute the factual findings and contractual determinations as made by the Louisiana Supreme Court in this case. In that Arkla as the wrongdoer has in this proceeding for obvious and self-serving reasons completely misconceived, distorted and obscured the true factual and contractual determinations that were properly made by the Louisiana Supreme Court in this case on March 5, 1979, Respondents feel compelled to answer and correct Arkla's unwarranted, erroneous and wholly self-serving representations and conclusions.

Moreover, Respondents submit that notwithstanding Arkla's erroneous and self-serving contentions a fair, impartial and objective reading and analysis of the Louisiana Supreme Court's final judgment in this case clearly confirms that Arkla as Respondents' contractual obligor wrongfully injured and damaged Respondents from 1961 through 1975 by continuously breaching and violating their private contractual rights and by improperly obstructing, preventing and precluding the timely and prospective implementation and fulfillment of their private contractual rights in a manner fully consistent with the true intent of the contract and all applicable laws, rules and regulations

in the same wrongful manner and improper extent that numerous other fair and impartial courts have also properly determined and held that Cities Service Gas Company, Gulf Oil Corporation, Kerr-McGee Corporation and Louisiana-Nevada Transit Company as similarly situated contractual obligors have likewise wrongfully injured and damaged other similarly situated contractual obligees by breaching and violating similar private gas sales contracts. See: *Western Natural Gas Co.* v. *Cities Service Gas Co.*, 507 P.2d 1236 (Okla. 1972), appeal dismissed and cert. den. 409 U.S. 1052 (1972); *Cities Service Gas Co.* v. *F.P.C.*, 535 F.2d 1278 (D.C. Cir. 1976); *Gulf Oil Corp.* v. *American Louisiana Pipe Line Co.*, 282 F.2d 401 (6th Cir. 1960); *Eastern Petroleum Co.* v. *Kerr-McGee Corp.*, 447 F.2d 569 (7th Cir. 1971); and *Louisiana-Nevada Transit Co.* v. *Woods*, 393 F. Supp. 177 (W.D. Ark. 1975).

Contrary to Arkla's contentions, just as the fair and impartial courts in the above cited cases legally protected and properly compensated the similarly situated innocent, injured and aggrieved parties against their actual losses and damages by applying well established rules and principles of contract law, equity and justice to the true facts as established in those cases, the Louisiana Supreme Court after five years of litigation in the instant case applied those same well established rules and principles of contract law, equity and justice to the true facts as established in this case and, thus, legally protected and properly compensated Respondents against the actual losses, damages and injuries which they have wrongfully sustained and incurred for fourteen years because Arkla as their contractual obligor in its own corporate self-interest elected to continuously breach and violate their private

legal and contractual rights and to effectively misrepresent and withhold all of the true, relevant and material facts from Respondents for fourteen years. While Arkla is obviously angry and upset over the fact that it after fourteen years finally got caught breaching and violating Respondents' private contractual rights and that the Louisiana Supreme Court has now properly fixed and determined its independent contractual liability in compensatory damages and monetary reparations for the actual losses and damages that it has caused Respondents to sustain and incur for fourteen years, Arkla's anger and corporate desire to evade and escape its contractual liabilities in compensatory damages does not excuse its obvious and bombastic efforts to totally distort and obscure the real factual findings and contractual determinations as now finally made by the Louisiana Supreme Court in this case after five years of active, extended and protracted litigation. Contrary to Arkla's inaccurate and erroneous contentions, fair and proper analysis confirms that the judgment of the Louisiana Supreme Court in this case does justice to the injured and damaged Respondents and at the same time does *not* involve, affect or undermine the Federal Power Commission's or the Federal Energy Regulatory Commission's regulatory responsibility under the Natural Gas Act to protect consumers from excessive prices for dry or residue gas as sold in interstate commerce. Arkla as the wrongdoer is in this proceeding obviously and desperately seeking to protect and preserve its own private fisc and corporate interest, *not* the public interest which is clearly not at stake in this case, at Respondents' loss, damage, detriment and expense.

Respondents submit that in the interest of correctness, comity, judicial economy and justice Arkla's

pending petition for a writ of certiorari should not be decided based upon Arkla's erroneous analysis of the factual evidence and self-serving misconceptions as to the contractual remedy and substantive law upon which the Louisiana Supreme Court ultimately relied in awarding Respondents compensatory damages and monetary reparations for their actual losses and injuries caused and sustained due to Arkla's wrongful and continued breach of contract in the instant case. Moreover, Respondents submit that under established rules of comity and appellate review this Court should in connection with its review of the conflicting allegations contained in Arkla's petition for a writ of certiorari and supplemental briefs fully consider and have the benefit of the final judgment as rendered by the Louisiana Supreme Court in this case which completely contradicts and refutes the erroneous and self-serving contentions as made by Arkla in this proceeding. Further, Respondents respectfully submit that under established rules of comity, appellate procedure and review this Court should in reviewing the inaccurate and unsupported allegations in Arkla's petition and briefs accord the final judgment of the Louisiana Supreme Court in this case its proper deference, respect, weight and dignity with regard to the specific factual findings and contractual determinations as made by the Louisiana Supreme Court by applying well established rules and principles of contract law, equity and justice to the true and established facts in this case.

I. The Decision of the Louisiana Supreme Court

After a United States district court by virtue of a "Judgment of Remand" dated February 2, 1976 [2] and the Federal Power Commission by means of four separate orders issued from March 8, 1976 through January 11, 1977 [3] in light of the applicable and controlling decisions of this Court properly, consistently and correctly remanded and deferred the factual and contractual issues as presented in the subject contractual and damage dispute between Arkla and Respondents to the Louisiana courts for resolution and adjudication, the Louisiana Supreme Court and the other courts below in order to resolve and adjudicate the factual and contractual issues as presented in this case had to and did by applying well established rules and principles of contract law to the factual evidence in this case make certain factual findings and contractual determinations with respect to the true intent of the parties to the subject January 11, 1952, gas sales contract. The Louisiana courts below by applying ordinary rules and principles of contract law to their factual findings in this case have now after five years of burdensome, extended and protracted litigation unanimously determined and held that it was the "true intent" of the parties to this specific contract for the subject favored nations clause to cover, include and apply to Arkla's

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[2] See: *Frank J. Hall, et al* v. *Arkansas Louisiana Gas Company*, CA 75-1168, wherein the United States District Court pursuant to 28 U.S.C. 1447(c) and (d) correctly remanded this case to the Louisiana courts for resolution and adjudication.

[3] See: *Arkansas Louisiana Gas Company* v. *Frank J. Hall, et al*, Docket No. RI76-28, wherein the Commission correctly, properly and consistently denied Arkla's "Petition For a Declaratory Order" and deferred this case to the Louisiana courts for resolution and adjudication.

contractual agreements with the United States Government under which and pursuant to which Arkla in its dual capacity as a pipeline purchaser and the owner and operator of a pipeline system in the Sligo Field, Bossier Parish, Louisiana actually paid higher prices to the United States Government for the Government's share of the dry or residue royalty gas, liquefiable hydrocarbons, gasoline and extracted plant products as produced from the same Sligo Gas Field during the same period of time and delivered into Arkla's same Sligo pipeline system and gas processing plant by means of monthly checks drawn and issued on its same "Gas Purchase Account" from September, 1961 through December, 1975. The Louisiana Supreme Court and the other courts below by applying well established rules of ordinary contract law to the true facts as established by the evidence in this case properly determined and confirmed the true intent of the parties to the subject contract and clearly the courts' interpretation of this private gas sales contract to determine the true intent of the parties when they perfected this contract on January 11, 1952 did *not* present or involve any real or substantial federal questions.

Contrary to Arkla's erroneous contentions in this proceeding, the Louisiana courts' unanimous determination and adjudication of the "true intent" of the parties when they perfected and executed the subject private contract on January 11, 1952 as a matter of ordinary contract law is entirely consistent with the overwhelming factual evidence in the case and other decided cases involving similar factual situations and similar private gas sales contracts. See: *Eastern Petroleum Co.* v. *Kerr-McGee Corp.*, 447 F.2d 569 (7th Cir. 1971), and *Louisiana-Nevada Transit Co.* v. *Woods*,

393 F.Supp. 177 (W.D.Ark. 1975). Moreover, an unanimously determined by all of the Louisiana courts below the parties to the subject private 1952 gas sales contract did *not* "intend" as Arkla now contends to restrict or endow the meaning and scope of the terms "purchase at higher prices from another seller" as contained in their private contract with the statutory meaning and scope of the term "sale" as used by Congress in the Natural Gas Act to describe "sales for resale in interstate commerce". See: *Skelly Oil Co., et al* v. *Phillips Petroleum Co.*, 339 U.S. 667 (1950) where this Court correctly observed and concluded that:

> "Even though the language of the contract may be identic with that of § 7(c), this language in the contract may have a scope independent of the proper construction of § 7(c). The same words, in different settings, may not mean the same thing... Parties do not necessarily endow statutory language in a contract with the scope of the statute, particularly when the same term may have variant meanings for different applications of the statute. See Standard Oil Company v. Johnson, 316 US 481, 483, 86 L ed 1611, 1614, 62 S Ct 1168....
>
> If Phillips sought damages from petitioner or specific performance of their contracts, it could not bring suit in a United States District Court on the theory that it was asserting a federal right. And for the simple reason that such a suit would 'arise' under the State law governing the contracts."

Clearly Arkla's total reliance upon the case of *Mobil Oil* v. *F.P.C.*, 463 F.2d 256 (D.C. Cir. 1971), which is neither factually nor legally applicable to the specific factual situation and contractual issues involved in the instant case, as determinative of the "true intent" of

the parties when they perfected their private contract on January 11, 1952 is completely misplaced and was properly rejected by all of the courts below. Arkla's misplaced reliance upon the *Mobil* case as decided in 1971 as having any bearing upon the "true intent" of the parties to the subject private gas sales contract when they perfected same on January 11, 1952 is further confirmed by the recent decisions of the F.E.R.C. and the Courts in *The Matter of Louisiana Land and Exploration Company* v. *Federal Energy Regulatory Commission,* 574 F.2d 204 (5th Cir. 1978), cert. den. —— U.S. —— (Docket No. 78-687) on January 22, 1979. These decisions inescapably demonstrate that the term "sale" as used by Congress in the Natural Gas Act has "variant meanings" for different factual situations.

The F.E.R.C. when faced with a factual situation similar to that presented in this case with respect to the "economic realities" of the contractual arrangements between Arkla in its dual capacity as a lessee-pipeline purchaser and the United States Government as a landowner that also controlled and determined the prices that it would receive in exchange for its share of the royalty gas as delivered and sold to Arkla properly concluded and held that a "letter contract" between Louisiana Land and Exploration Company ("Land"), as the landowner-royalty owner-seller, and Tennessee Gas Transmission Company ("Tennessee"), as the lessee-pipeline purchaser, constituted a "sale" of Land's royalty gas to Tennessee, which like Arkla in the instant case occupied the dual position as a lessee-pipeline purchaser, within the meaning and intent of the term "sale" as used by Congress in the Natural

Gas Act. The Commission correctly ignored and disregarded the labels ("royalty settlement") that were used to describe Tennessee's receipt of and payment for Land's royalty gas as delivered into its interstate pipeline system and looked at the "economic realities" of the "contractual arrangement" and the actual "transactions" to determine if there had been a "sale" of Land's royalty gas to Tennessee. The Commission in resolving the dispute ultimately found that Land as the landowner-lessor, just like the United States Government in this case, controlled the "incidents" of the sale of its royalty gas to Tennessee as its lessee-pipeline purchaser by fixing and determining the "price" per Mcf that Tennessee would pay to Land in exchange for its royalty gas as delivered into Tennessee's interstate pipeline system. Thus, the Commission held that in light of "economic realities" and Land's control of the "incidents" of the sale under the March 14, 1960 "letter contract" there was a "sale" of Land's royalty gas to Tennessee and that since Land's royalty gas was delivered into an interstate pipeline system there was a "sale for resale" as intended by Congress under the Natural Gas Act. The United States Court of Appeals for the Fifth Circuit in affirming the F.E.R.C.'s decision held that:

> "FERC reasoned that '[t]he result . . . that Amoco is selling part of the gas to Tennessee for 21 cents per Mcf while Land . . . is receiving 25 cents for another part of the gas . . . economically is a sale' and concluded that 'the kind of transaction here developed between Land . . . and Tennessee does not represent a royalty transaction but a sale of natural gas in interstate commerce subject to the jurisdiction of the Commission.' . . .
>
> Although Land would have us conclude that because it owns no gas it could never have made a

sale of gas in interstate commerce, an analysis of relevant authorities leads us to a less mechanical interpretation of the Act. . .

. . . a restrictive definition of 'the sale in interstate commerce of natural gas . . .' is inappropriate if it ignores economic realities.

This conclusion draws additional support from the reasoning of the court in Mobil Oil Corp. v. FPC, . . The court in Mobil reversed a FERC order declaring that when a landowner executes an oil and gas lease providing royalties to be measured by proceeds or value of extracted gas, ' "he has contracted to retain an economic interest in interstate sales by the producer," and "has joined the other interest owners in such sales and he has become a seller of natural gas," ' . . In reversing the FERC decision, the court reasoned that an economic interest in the proceeds of a sale, unaccompanied by authority to determine the incidents of the sale, does not make the interest owner a seller within the Natural Gas Act. Thus, the Mobil opinion anticipates the facts of this case and supports our conclusion that economic realities and not labels determine whether a jurisdictional sale has occurred. . . .

Moreover, the exercise of the power, coupled as it was with an alteration of the royalty rate, had the effect of altering not only the cost of extracting the gas but also the cost of introducing the gas to commerce. Under these circumstances, we conclude that in economic effect Land sold gas in interstate commerce subject to FERC jurisdiction. We hold that by retaining a royalty interest in gas extracted from premises leased to Amoco, retaining power to prevent Amoco from selling its entire interest in proven and developed reserves to a pipeline company, and agreeing to an amendment of the terms of the royalty payments before consenting to the jurisdictional transfer, Land made a jurisdictional sale of natural gas."

Arkla for obvious reasons has selectively failed to cite or discuss the *Louisiana Land case, supra,* which clearly demonstrates that *Mobil* is *not* "paramount federal law"; and even if it was definitive as to the meaning of the term "sale" as contained in the Natural Gas Act for all factual situations, which it clearly is not, *Mobil* is totally irrelevant and inapplicable as to the lower courts' determination in this case of the true intent of the parties to the subject private gas sales contract when they perfected same on January 11, 1952.

Arkla in this proceeding for obvious reasons seeks to completely ignore and disregard its dual capacity as a lessee-pipeline purchaser in its "contractual agreements" with the United States Government and the "economic realities" of the financial transactions wherein the United States Government has controlled and determined the "prices" which Arkla as a pipeline purchaser has had to pay for the United States Government's share of the royalty gas as produced from the Sligo Gas Field and delivered into Arkla's Sligo gas pipeline system from 1961 through 1975. Contrary to Arkla's representations in this proceeding, all of the courts below correctly determined in light of the evidence and the sworn testimony of Arkla's own officers and officials that Arkla in its dual capacity as a pipeline purchaser fully complied with its contractual obligations to the United States Government under Section 2(n) of Arkla's 1961 contract with the United States Government which expressly provided that:

> "Lessee agrees: If owner, or operator, or owner of a controlling interest in any pipe line or of any company operating the same which may be operated accessible to the oil or gas derived from

lands under this lease, to accept and convey and, if a purchaser of such products, to purchase at reasonable rates and without discrimination the oil or gas of the Government or of any citizen or company not the owner of any pipe line, operating a lease or purchasing or selling oil, gas, natural gasoline, or other products obtained under a lease or permit granted by the United States."

Additionally, the courts below unanimously and correctly found that Arkla in its dual capacity as a pipeline purchaser fully complied with its November 15, 1962 letter contract with the United States Government which expressly provided that:

> "By your letter of March 27, 1962 you determined prices, so far as concerns the Government's royalty gas of $0.117432 per mcf until January 1, 1962; $0.130252 until January 1, 1967 and thereafter $0.140508 at a pressure base of 15.025 p.s.i.a. In view of the Government's right under the lease contract to determine the value of its royalty gas, but without conceding that the above figures represent market value in the Sligo Field, we have decided that we should accede to the determination and have initiated the proper procedures in our organization to see that accounting and payment is made for Arkansas Louisiana Gas Company's share of the gas at the above figures."

Arkla in this proceeding further ignores the fact that the United States Government consistent with its contractual rights exercised control over the "incidents" of the sale of its royalty gas to Arkla and that Arkla "paid" the agreed upon "prices" for the United States Government's royalty gas as delivered into its Sligo gas pipeline system by means of monthly checks drawn and issued on its "Gas Purchase Account" from 1961 through 1975. Based upon the specific "terms" as

contained in Arkla's contracts with the United States Government and the "economic realities" of the transactions by which Arkla received and paid for the Government's royalty gas as delivered into its Sligo pipeline system, all of the Louisiana courts below have properly and correctly determined and held that Arkla's payment of "higher prices" pursuant to Arkla's "contractual agreements" with the United States Government for the Government's royalty gas as produced from the same Sligo Gas Field from 1961 through 1975 constituted "the payment of a higher price to another seller" within the true meaning and intent of the parties who perfected the subject private gas sales contract on January 11, 1952. The courts in this case had to and did determine the true intent of the parties who perfected this private contract on January 11, 1952, *not* the intent of Congress in using certain terms in a federal statute, which terms clearly have "variant meanings" under different factual situations.

The Louisiana Supreme Court after reviewing and considering the 4,987 pages of sworn testimony and the 454 items of documentary evidence as adduced at the trial of this case and by applying well established rules of contract law to the facts of this case determined and decreed that Arkla continuously breached and violated its affirmative contractual duties and obligations to the Respondents herein for fourteen years by failing to timely, properly, cooperatively and in good faith honor, perform and fulfill Respondents' private contractual rights in a manner consistent with the true intent of the parties and all applicable laws, rules and regulations for fourteen years. Moreover, the Louisiana Supreme Court by applying well established rules of contract law to the evidence in this

case determined and decreed that Arkla wrongfully injured and damaged the Respondents herein for fourteen years by improperly obstructing, preventing and precluding the timely and prospective implementation, effectuation and fulfillment of Respondents' private contractual rights in a manner consistent with the true intent of the contract and all applicable laws, rules and regulations for fourteen years.[4] Further, the Louisiana Supreme Court by applying well established rules of contract law to the facts of this case has determined and decreed that the Respondents herein are entitled to recover monetary damages and reparations in compensation for the actual losses and damages sustained and incurred by Respondents because Arkla as their contractual obligor continuously breached and violated their contractual rights and effectively prevented the timely and prospective implementation, effectuation and fulfillment of Respondents' private contractual rights in a manner consistent with the true intent of the contract and all applicable laws, rules and regulations for fourteen years.

The substantive rules and principles of contract law, equity and justice as applied to the facts of this case by the Louisiana Supreme Court are:

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[4] Arkla's own "Internal Memorandums" (Respondents' Appendix B, C, D and E) evidence and confirm the fact that Arkla as early as the fall of 1961 was cautioned and warned by its *own* officers and officials about the potential "problem" and "additional costs" that it could incur under the "favored nations clause" in its 1952 contract with Respondents if it paid "higher prices" for the United States Government's royalty gas as produced from the same Sligo Gas Field, Bossier Parish, Louisiana. Arkla's *own* "Internal Memorandum" dated January 17, 1974 (Respondents' Appendix E) confirms that Arkla "deliberately" elected to continue to withhold and conceal from Respondents all of the true, relevant and material facts concerning its continued breach and violation of Respondents' private contractual rights.

(a) "In the absence of an express provision therefore, the law will imply an agreement by the parties to a contract to do and perform those things that according to reason and justice they should do in order to carry out the purpose for which the contract was made. Moreover, in every contract there exists an implied covenant of good faith and fair dealing; and, more specifically, under such rule, the law will imply an agreement to refrain from doing anything which will destroy or injure the other party's right to receive the fruits of the contract....

It is implied in every contract that there is a duty of co-operation on the part of both parties."

See: *Corpus Juris Secundum,* 17A, Contracts, § 328 pp. 284-287, and Notes 40.5 and 41.

(b) "Where a contract is performable on the occurrence of a future event, there is an implied agreement that the promisor will place no obstacle in the way of the happening of such event, particularly where it is dependent in whole or in part on his own act; and, where he prevents, hinders, or renders impossible, the fulfillment of a condition precedent or its performance by the adverse party, or is himself the cause of failure to perform the condition, he cannot rely on such condition to defeat his liability. A party who prevents the fulfillment of a condition of his own obligation commits a breach of contract; and a party whose misconduct has rendered it futile, as a practical matter, for the other party to fulfill a condition cannot complain of his failure to do so."

See: *Corpus Juris Secundum,* 17A, Contracts, § 468(b) pp. 645-646.

(c) "'The party who is prevented by the other party from performing, or whose performance is made impossible by him, may treat the contract as broken or breached, or as repudiated, or rescinded, and may recover whatever damages he may have sustained, . . .'"

See: *Corpus Juris Secundum,* 17A, Contracts, §469 p.647;

Restatement of Contracts, § 302 (1932);

3A Corbin, Contracts, § 748 (1960);

5 Williston, Contracts, §§ 670, 677 (3d ed. 1961);

11 Williston on Contracts, §§ 1296, 1316 (3d ed. 1968); and

3 Corbin, Contracts, § 568, pp. 331-334 (1960).

(d) "The measure of damages for a breach of contract is substantive law. In the case of a breach of contract the measure of damages is an amount which will compensate the injured person for the loss which a fulfillment of the contract would have prevented or the breach of it has entailed."

See, *Corpus Juris Secundum,* 25, Damages, § 74 p. 843.

(e) "The primary aim in measuring damages is compensation, and this contemplates that compensatory damages for a breach of contract should place the injured party in the same position he would be in if the contract had been fulfilled, or to place the injured party in the same position he would have occupied if the breach of contract had not occurred."

See: *3 Williston on 'Sales',* § 599, p. 293;

McCormick on Damages, § 137, p. 560;

Corbin on Contracts, §§ 1029 and 1088;

Summers, The Law of Oil & Gas, §§ 434 and 435; and

Restatement of the Law of Contracts, § 329.

The above and foregoing substantive rules and principles of contract law, equity and justice were correctly and properly applied by the Louisiana Supreme Court to true and actual facts in this case in order to justly compensate and protect Respondents against the actual losses as caused by Arkla's breach of contract and continued misconduct from 1961 through 1975 in the same manner that this Court and all other courts of this Nation have likewise properly and consistently applied and enforced the same well established rules and principles of contract law, equity and justice to protect similarly injured and aggrieved parties against similar losses and damages caused by the breach and violation of contractual obligations, to wit:

(a) *United States* v. *Peck,* 102 U.S. 64 (1880):

". . . the conduct of one party to a contract which prevents the other from performing his part is an excuse for non-performance, see Addison, Cont., sec. 326; Fleming v. Gilbert, 3 Johns., 527 . . . 'It is a sound principle that he who prevents a thing being done shall not avail himself of the non-performance he has occasioned.'."

(b) *Deitrick* v. *Greaney,* 309 U.S. 190 (1940):

"It is a principle of the widest application that equity will not permit one to rely on his own wrongful act, as against those affected by it but who have not participated in it, to support his own asserted legal title or to defeat a remedy which except for his misconduct would not be available. See United States v. Dunn, 268 US 121, 133, 69 L ed 876, 882, 45

S Ct 451; Independent Coal & Coke Co. v. United States, 274 US 640, 648, 71 L ed 1270, 1278, 47 S Ct 714."

(c) *Albemarle Paper Co.* v. *Moody,* 422 U.S. 405 (1975):

"And where a legal injury is of an economic character,

'[t]he general rule is, that when a wrong has been done, and the law gives a remedy, the compensation shall be equal to the injury. The latter is the standard by which the former is to be measured. The injured party is to be placed, as near as may be, in the situation he would have occupied if the wrong had not been committed.' Wicker v. Hoppock, 6 Wall 94, 99, 18 L Ed 752 (1867)."

(d) *Story Parchment Co.* v. *Paterson P. Paper Co.,* 282 U.S. 555 (1931):

"As the supreme court of Michigan has forcefully declared, the risk of the uncertainty should be thrown upon the wrongdoer instead of upon the injured party. Allison v. Chandler, 11 Mich. 542, 550-556. . .

'. . . And the adoption of any arbitrary rule in such a case, which will relieve the wrongdoer from any part of the damages, and throw the loss upon the injured party, would be little less than legalized robbery.'."

See also: *State of Louisiana* v. *F.P.C.,* 503 F.2d 844 (5th Cir. 1974); *Monsanto Co.* v. *F.P.C.,* 463 F.2d 799 (D.C. Cir. 1972); *International Paper Co.* v. *F.P.C.,* 476 F.2d 121 (5th Cir. 1973); *Gulf Oil Corp.* v. *American Louisiana Pipe Line Co.,* 282 F.2d 401 (6th Cir. 1960); *Western Natural Gas Co.* v. *Cities Service Gas Co.,* 507 Pac.2d 1236 (Okla. 1972), appeal dismissed and cert. den., 409 U.S. 1052 (1972); *Cities Service Gas Co.* v. *FPC,* 535 F.2d 1278 (D.C. Cir. 1976); *Eastman Kodak Co.* v. *Southern Photo Materials Co.,* 273 U.S. 359 (1926); *Eastern Petroleum Co.* v. *Kerr-McGee Corp.,* 447 F.2d 569 (7th Cir. 1971); *Louisiana-Nevada Transit Co.* v. *Woods,* 393 F. Supp. 177 (W.D. Ark. 1975); *Atlas Trading Corp.* v. *S. H. Grossman, Inc.,* 169 F.2d 240 (3d Cir. 1948); *Vanadium Corp. of America* v. *Fidelity and Deposit Co.,* 159 F.2d 105 (2d Cir. 1947); *Watson Bros. Transportation Co.* v. *Jaffa,* 143 F.2d 340 (8th Cir. 1944); *Rochester Park, Inc.* v. *City of Rochester,* 238 N.Y.S.2d 822 (1963), aff'd, 241 N.Y.S. 2d 763; *Lennon* v. *Habit,* 216 N.C. 141, 4 S.E.2d 339 (1939); *George W. Garig Transfer, Inc.* v. *Harris,* 226 La. 117, 75 So.2d 28 (1954); *Gridiron Steel Co.* v. *Jones & Laughlin Steel Corp.,* 361 F.2d 791 (6th Cir. 1966); *Peter Kiewit Sons' Co.* v. *Summit Construction Co.,* 422 F.2d 242 (8th Cir. 1969); *Ballard* v. *El Dorado Tire Co.,* 512 F.2d 901 (5th Cir. 1975); *Ammerman* v. *Miller,* 488 F.2d 1285 (D.C. Cir. 1973); and *Christensen* v. *Felton,* 322 F.2d 323 (9th Cir. 1963).

In the final analysis the Louisiana Supreme Court has in light of the true and actual facts of this case and well established rules and principles of law, equity and justice properly compensated and protected Respondents against the actual losses and damages that they have sustained and incurred due to Arkla's continued breach of contract and wrongful misconduct for fourteen years in the same proper and just manner that all of the Courts properly protected and compensated Western Natural Gas Company by an award of compensatory damages in the sum of $5,026,000.00 for the actual losses caused by Cities Service Gas Company's breach and violation of a 1949 private gas sales contract that covered the sale of natural gas in interstate

commerce and was filed with the F.P.C. as part of a rate schedule under the Natural Gas Act. See: *Western Natural Gas Co.* v. *Cities Service Gas Co.*, 507 Pac.2d 1236 (Okla. 1972), appeal dismissed and cert. den. 409 U.S. 1052 (1972) and *Cities Service Gas Co.* v. *F.P.C.*, 535 F.2d 1278 (D.C. Cir. 1976). Certainly, the Respondents herein under the facts of this case and the same well established rules and principles of contract law, equity and justice are legally entitled to the same measure of justice and equal protection of the law from the wrongful losses and damages caused by Arkla's continued breach and violation of their contractual rights as was the Western Natural Gas Company in the above cited cases. Moreover, careful analysis will reveal that Arkla has in this proceeding done nothing more than to readopt, rephrase, reuse and reassert the same erroneous and unjust theories and contentions that were unsuccessfully used and employed by Cities Service Gas Company to attempt to escape and evade its legal and contractual liabilities in compensatory damages and monetary reparations for the actual losses and damages caused by virtue of its continued breach and violation of a similar 1949 private gas sales contract.

II. The Regulatory Responsibilities of the F.P.C. and F.E.R.C. Under the Natural Gas Act to Protect Consumers From Excessive Prices for Natural Gas Sold in Interstate Commerce Were Not Involvd or Affected in This Case.

Contrary to Arkla's erroneous and inflammatory contentions in this proceeding, this Court and accordingly numerous other courts of this Nation have repeatedly held that the Natural Gas Act, as enacted by Congress in 1938 to protect consumers from "excessive prices" for residue natural gas as sold in interstate commerce,

recognized the continued need for private gas sales contracts of varying terms and was fully intended by Congress to preserve the integrity of private gas sales contracts and the fundamental contractual rights of injured parties to judicially recover compensatory damages and monetary reparations for actual losses and injuries caused and sustained by the breach and violation of private gas sales contracts. See: *Skelly Oil Co.* v. *Phillips Petroleum Co.*, 399 U.S. 667 (1950); *United Gas Pipe Line Co.* v. *Mobile Gas Corp.*, 350 U.S. 332 (1956): *Pan American Petroleum Corp.* v. *Superior Court of Delaware*, 366 U.S. 656 (1961); *Gulf Oil Corp.* v. *American Louisiana Pipeline Co.*, 282 F.2d 401 (6th Cir. 1960); *State of Louisiana* v. *F.P.C.*, 503 F.2d 844 (5th Cir. 1974); *Monsanto Co.* v. *F.P.C.*, 463 F.2d 799 (D.C. Cir. 1972); *International Paper Co.* v. *F.P.C.*, 476 F.2d 121 (5th Cir. 1973); *Western Natural Gas Co.* v. *Cities Service Gas Co.*, 507 Pac.2d 1236 (Okla. 1972), appeal dismissed and cert. den. 409 U.S. 1052 (1972); *Cities Service Gas Co.* v. *F.P.C.*, 535 F.2d 1278 (D.C. Cir. 1976); *City of New Orleans* v. *United Gas Pipe Line Co.*, 390 F.Supp. 861 (E.D. La. 1974); and *Skelly Oil Co.* v. *F.P.C.*, 532 F.2d 177, 179 (10th Cir. 1976).

Arkla in this proceeding has simply disregarded the above cited cases and the fact that the Respondents' judicial recovery of compensatory damages for their actual losses and injuries in this case is completely compatible and consistent with the regulatory purposes of the Natural Gas Act to protect consumers from excessive prices for dry or resique natural gas as sold in interstate commerce. First, Arka ignores the fact that the F.P.C. pursuant to the Natural Gas Act many years ago in the exercise of its regulatory responsibility to protect consumers against excessive prices for residual

natural gas sold in interstate commerce determined and decreed that "favored nations clauses" as contained in private gas sales contract perfected prior to April 3, 1961 are consistent with the public interest and, thus, are valid and enforceable as a matter of contract law up to the Commission's established and approved maximum, lawful, just and reasonable area rate ceilings. The F.P.C. also has determined that private gas sales contracts perfected on or after April 3, 1961 may not contain "favored nations clauses". See: 18 C.F.R. 154.93. In that the subject private gas sales contract between Arkla and the Respondents herein was perfected on January 11, 1952, the favored nations clause as contained in this private contract was and is under the Commission's own rules and regulations (18 C.F.R. 154.93) a valid and enforceable contractual obligation which as a matter of private contract law could and should have been timely and cooperatively honored, performed and fulfilled by Arkla from 1961 through 1975 in a manner consistent with all applicable F.P.C. rules and regulations and the relevant public interest against excessive prices for residue gas as sold in interstate commerce.

Secondly, Arkla in this proceeding further ignores and totally disregards the fact that the F.P.C. in carrying out its regulatory responsibilities to protect consumers against excessive prices for dry or residue natural gas as sold in interstate commerce from 1961 through 1975 has by means of its *"Statement of General Policy No. 61-1"* (24 FPC 818) and *"Other Southwest Area Rate Order No. 607 and 607-A"* (18 C.F.R. §§ 154.109 and 154.109a) heretofore determined, fixed, established and approved the maximum lawful, just and reasonable area rate ceilings up to which the Respondents herein could and should have received as contractually authorized for their dry or residue gas as sold to Arkla under the subject contract from 1961 through 1975 *had* Arkla timely honored the contract and prospectively cooperated with Respondents as it was contractually obligated to do under well established and unimpeachable rules and principles of contract law, equity and justice.

Thus, it is clear that the F.P.C. in protecting the public interest from excessive prices for dry or residue natural gas as sold in interstate commerce under the subject contract many years ago determined that it would have been in accordance with the public interest and consistent with the public interest for Respondents to receive their contractually authorized prices for their dry or residue gas up to the maximum, lawful, just and reasonable area rate ceilings, which from 1961 through 1975 ranged from $0.14 per Mcf to $0.206 per Mcf. Prior to the time the Respondents herein became certified as "small producers" by the F.P.C. in 1972, Respondents received approximately $0.08 per Mcf to $0.11 per Mcf for their dry or residue gas as sold to Arkla under the subject contract, when in fact and in law, as unanimously determined by all of the Louisiana courts, Respondents were contractually authorized and entitled to receive $0.117 per Mcf to $0.14 per Mcf for their dry or residue gas as sold to Arkla under the subject private gas sales contract. These contractually authorized prices which Respondents did not receive due to Arkla's continued breach of contract for fourteen years were without question consistently and substantially *below* the Commission's applicable maximum, lawful, just and reasonable area rate ceilings. Thirdly, Arkla in this proceeding also fails to mention

and completely ignores the fact that the contractually authorized prices which Respondents could and should have received for their liquefiable hydrocarbons, gasoline and extracted plant products as sold to Arkla from 1961 through 1975 under the subject contract, but did not receive from Arkla because of its continued breach of contract and successful withholding of the true facts from Respondents for fourteen years, have never been limited or restricted by the F.P.C. under the Natural Gas Act.

Therefore, it is clear that Respondents could and would as contractually authorized and in a manner consistent with all applicable F.P.C. rules and regulations have received additional monies for their liquefiable hydrocarbons, gasoline, extracted plant products and dry or residue gas as sold to Arkla from 1961 through 1975 under the subject gas sales contract *had* Arkla as Respondents' contractual obligor elected to timely honor its contractual obligations to the Respondents herein and to timely "cooperate" with Respondents from 1961 through 1975. Moreover, as determined by the Louisiana Supreme Court, Arkla by breaching and violating Respondents' private contractual rights and by successfully withholding all of the true, relevant and material facts from Respondents for fourteen years effectively obstructed, hindered, prevented and precluded Respondents from timely and prospectively filing for, obtaining and receiving the legal and contractual fruits and benefits of their favored nations rights which were entirely compatible and consistent with the applicable rules and regulations of the F.P.C. under the Natural Gas Act.

Arkla in attacking the judgment of the Louisiana Supreme Court in this case has for the purpose of a

shock effect wrongfully and inaccurately asserted that Respondents were claiming compensatory damages and monetary reparations measured in part by contractually authorized prices for their dry or residue gas that were in excess of the maximum, lawful, just and reasonable area rates as previously fixed, established and approved by the F.P.C. in its *"Statement of General Policy No. 61-1"* (24 FPC 818) and *"Other Southwest Area Rate Order No. 607 and 607-A"* (18 C.F.R. §§ 154.109 and 154.109a). This allegation is completely false and untrue. As correctly determined and concluded by the Louisiana Supreme Court in its judgment dated March 5, 1979 at page 12:

> "We note that plaintiffs make no claim that they would have been entitled to a price increase under their contract in excess of the respective area base rate ceilings for sales of natural gas as established by order of the Commission."

Moreover, Arkla in this proceeding has erroneously asserted and suggested that the Louisiana Supreme Court in resolving the quantum of damages issue in this case invaded and usurped the exclusive regulatory jurisdiction and authority of the F.P.C. and F.E.R.C. to protect consumers from excessive prices for dry or residue natural gas as sold in interstate commerce by determining and fixing maximum, lawful, just and reasonable area rates for the sale of natural gas in interstate commerce. This assertion is likewise completely false and inaccurate. Contrary to Arkla's wholly inaccurate charges which have obviously been made for the purpose of attempting to create a real and substantial federal question in this case, where none in fact

exists, the Louisiana Supreme Court in its judgment dated March 5, 1979 expressly concluded and held that:

> "*We note, at the outset, that this controversy involves plaintiffs' claims for damages arising from defendant's breach of a gas purchase contract.* The claims herein are not founded upon any liability created by the Natural Gas Act, but, rather, are founded upon a private contract deriving its force and effect from state law. *There is no issue herein as to the reasonableness of the price, nor any attempt to adjudicate a proper rate, as defendant argues.* Issues involving contract violation were not made subject to the cognizance of the Federal Power Commission by the enactment of the Natural Gas Act. Pan American Petroleum Corp. v. Superior Court, 366 U.S. 656 (1961). The regulatory system of the Natural Gas Act is built upon private contracts, as modified by the Act, and the Act evinces no purpose to abrogate private gas purchase contracts. United Gas Pipe Line Co. v. Mobile Gas Service Corp., 350 U.S. 332 (1956). *A determination of the appropriate measure of compensatory damages due plaintiffs as a result of defendant's breach of a private contract is, we believe, a matter particularly within the purview of our state law and state courts.*
>
> It is conceded by the parties before us that plaintiffs' recovery of damages arising from defendant's breach of contract is to be measured by the difference between the price paid by defendant to the United States government and the price paid by it to plaintiffs (after adjustment for pertinent factors as indicated in the court of appeal opinion)
> . . .
>
> Article 2040, properly interpreted, means that the condition is considered fulfilled, when it is the debtor, bound under that condition, who prevents the fulfillment. . . . *This rule is but an application of the long-established principles of law that he who prevents a thing may not avail himself of the non-performance he has occasioned and that one should not be able to take advantage of his own wrongful act.*" (Emphasis added)

While Arkla as the wrongdoer bombastically and erroneously contends that the Louisiana Supreme Court in measuring and awarding compensatory damages and reparations in the instant case ignored, disregarded and exceeded the maximum, lawful, just and reasonable area rate ceilings as previously established and approved by the F.P.C. for the sale of dry or residue gas in interstate commerce under the 1952 contract, the Louisiana Supreme Court has contrary to Arkla's wholly inaccurate and erroneous assertions properly recognized, respected, honored and adhered to the maximum, lawful, just and reasonable area rate ceilings as previously established and approved by the F.P.C. (*"Statement of General Policy No. 61-1"* and *"Order 607 and 607-A"*) in its determination of a proper measure of compensatory damages and reparations in the instant case. In fact the Louisiana Supreme Court at page 11 of its March 5, 1979 judgment expressly noted and stated that:

> "At trial, a November 8, 1976 order of the Commission was produced which indicated the maximum rates to which plaintiffs would have been entitled if contractually authorized and *if* proper filing procedures had been followed (Exhibit D-59). The Commission clearly indicated in its order that it would have approved such rates."

The November 8, 1976 order of the Commission (Exhibit D-59) as referred to and considered by the Louisiana Supreme Court in measuring damages and reparations in this case was rendered by the Commis-

sion in the proceeding "*Arkansas Louisiana Gas Company* v. *Frank J. Hall, et al,* Docket No. RI 76-28", and in pertinent part provides that:

> "Respondents request amplification of the Commission's order issued June 4, 1976, in regard to the maximum rates, for each year beginning in the fall of 1961 through the year 1972 which, if contractually authorized and if proper filing procedures had been followed, would have been approved by the Commission pursuant to its *'Other Southwest Area Rate'* Opinion Nos. 607 and 607-A. The respective area base rate ceilings for sales of natural gas under Opinion Nos. 607 and 607-A from Northern Louisiana by a producer with contractual authority who properly filed are:
>
> | Prior to January 1, 1965 | From Jan. 1, 1965 Thru Sept. 30, 1968 | From October 1 1968 thru 1972 |
> |---|---|---|
> | 16.7¢ per Mcf at 15.025 psia | 18.6¢ per Mcf at 15.025 psia | 20.6¢ per Mcf at 15.025 psia |
>
> Where, as here, the sale contract provides for the sale of natural gas at the wellhead, the ceilings set forth above for such sale are subject to a 1.0¢ per Mcf downward adjustment for wellhead delivery. . ."

The "March 8, 1976 Order" as referred to by the Commission in its "November 8, 1976 Order" (Exhibit D-59) was rendered by the Commission after it had fully studied and carefully considered Respondents' breach of contract action which was at that time pending in the Louisiana State district court for trial on its merits. In light of the applicable and controlling decisions of this Court, numerous other courts and its own *Rowan Policy, Rowan* v. *Allied Chemical Corp.,*

39 F.P.C. 64, 66, 67 (1968), the Commission in deferring the contractual issues as presented in this case to the Louisiana courts for resolution and adjudication properly concluded and correctly held that:

> "Arkansas Louisiana Gas Company (Arkla) on September 11, 1975, filed a petition for a declaratory order in the above-entitled proceeding contending that the 'favored nations' clause in the January 11, 1952 contract with Frank J. Hall, et al. (Respondents) was not triggered by certain royalty payments made to the United States Government by Arkla. . . .
>
> *The circumstances of the dispute between Arkla and Respondents do not call for any different result than that reached in the Pan American case, supra, or the Rowan case, supra. This case presents a question of concurrent jurisdiction, not primary or exclusive jurisdiction. The Commission has jurisdiction over rates, filing and notice as to both Arkla and Respondents. While this Commission has jurisdiction to decide the subject contract question, the Louisiana court also has jurisdiction over an action based upon asserted breach of contract. Accordingly, we believe it appropriate to defer to the court to decide these contract questions.*
>
> For reasons set forth above, Arkla's petition for declaratory order filed on September 11, 1975 in the above-entitled proceeding is denied." (Emphasis added)

The fact that the Commission's regulatory responsibility to protect consumers from excessive prices is not affected or involved in this case was again subsequently recognized and confirmed by the conclusions of the F.E.R.C.'s own staff counsel in their brief dated August 23, 1978 and filed with the Commission in the proceeding, "*Arkansas Louisiana Gas Company* v.

Frank J. Hall, et al, Docket No. RI 76-28", wherein the Commission's staff counsel objectively and independenly observed and concluded that:

> "Only contracts executed prior to April 3, 1961 may contain favored nations clauses. Therefore, contracts involving jurisdictional sellers which contain these clauses will become relatively infrequent.
>
> *Concern that a court might order Arkla to pay excessive rates in the guise of contract damages is not warranted under the circumstances of this case. Even if respondents are entitled to a rate increase, the applicable ceiling rates under the Commission's regulations will impose a limitation on the damages respondents may receive from a court. . . .*
>
> *Therefore, the issue in this case is limited to the damages respondents may receive up to these ceiling rates; the question whether such damages would constitute an unreasonable and unjust rate, which would be in the exclusive jurisdiction of the Commission, Montana Dakota Utilities* v. *Northwestern Public Service Co.,* 341 U.S. 246 (1951), *is not present. Therefore, the Commission's regulatory responsibility to protect consumers from excessive rates is not involved.*" (Emphasis added)

Thus, in light of a fair, proper and objective analysis, it is clear that the instant lawsuit as now finally resolved and adjudicated by the Louisiana Supreme Court involved a judicial determination of Arkla's continued breach and violation of Respondents' private contractual rights for fourteen years and a judicial determination of the actual losses and damages Respondents sustained and incurred for fourteen years due to Arkla's continued breach of contract and Arkla's effective withholding and concealment of all of the true, relevant and material facts from Respondents for fourteen years. In light of the judgment of the Louisiana

Supreme Court it is abundantly clear that this case did *not* and does *not* involve or adversely affect the public's need to be protected from excessive prices for dry or residue natural gas as sold in interstate commerce. The F.P.C. in performing its regulatory responsibilities has properly and previously protected this relevant public interest by virtue of its enactment of its maximum, lawful, just and reasonable rate ceilings as set forth in its "*Statement of General Policy No. 61-1*" (24 FPC 818) and "*Other Southwest Area Rate Order No. 607 and 607-A*" (18 C.F.R. § 154.109 and 154.109a). As evidenced by the Louisiana Supreme Court's judgment, the Commission's maximum, lawful, just and reasonable area rate ceilings were in no way contested, challenged, violated or disputed in this case. The Commission in its prior orders has specified and confirmed its established and approved maximum, lawful, just and reasonable area rate ceilings for dry or residue natural gas sold under the subject private gas sales contract from 1961 to 1975. Moreover, the Commission has also confirmed that it has *not* and did *not* establish any maximum rate ceilings or prices for the liquefiable hydrocarbons, gasoline and extracted plant products as sold by Respondents to Arkla under the subject contract from 1961 to 1975.

The Louisiana Supreme Court has properly protected the "integrity" of Respondents' private contractual rights against the actual losses and damages sustained due to Arkla's continued breach and violation by awarding Respondents compensatory damages and monetary reparations in this case based upon nothing more than what Respondents could and would have received and obtained for their liquefiable hydrocarbons, natural gasoline, extracted plant products and

dry or residue gas as contractually authorized and in a manner fully consistent with all applicable laws, rules and regulations *had* Arkla *not* continuously breached and violated Respondents' private contractual rights for fourteen years and *had* Arkla *not* effectively obstructed, prevented and precluded the timely and prospective performance and fulfillment of Respondents' contractual rights for fourteen years. Further, the Louisiana Supreme Court in measuring damages has at the same time properly recognized, honored and respected the maximum, lawful, just and reasonable area rate ceilings as previously approved and established by the Commission for the sale of dry or residue gas in interstate commerce under the subject gas sales contract. Under fair and proper analysis the judgment of the Louisiana Supreme Court in this case does *not* in any manner adversely involve or affect the relevant public interest against excessive prices for dry or residue gas as sold in interstate commerce.

III. Without F.E.R.C.'s Express Approval and Consent Arkla May Not and Must Not Pass Through Any of the Compensatory Damages and Reparations Awarded Respondents in This Case to Its Public Consumers in Interstate Commerce.

Contrary to Arkla's rather inverted, diffuse, erroneous and self-serving theories, as obviously borrowed from Cities Service Gas Company, the Louisiana Supreme Court's judgment awarding Respondents compensatory damages and monetary reparations as rendered in this case on March 5, 1979 clearly does *not* involve or adversely affect the public interest against excessive prices for natural gas as sold in interstate commerce and does *not* in any way authorize, permit or even suggest that Arkla may pass through *any*

portion of the compensatory damages and reparations to its customers in interstate commerce as an increased cost for their dry or residue natural gas. As the matter now stands Arkla must and can easily pay the compensatory damages and reparations out of its own private fisc and corporate profits and in effect return to Respondents the unjust enrichment in the form of additional corporate profits that it has accumulated at Respondents' loss, damage, detriment and expense for fourteen years by continuously breaching and violating Respondents' private contractual rights for fourteen years and by effectively obstructing, preventing and precluding the timely implementation and enforcement of Respondents' private contractual rights in a manner consistent with the true intent of the contract and all applicable laws, rules and regulations for fourteen years.

Arkla in its annual corporate reports has represented that during the years that it has continuously breached and violated Respondents' private contractual rights and has unjustly enriched itself as a result thereof at Respondents' loss, damage, detriment and expense Arkla has accrued net corporate profits exceeding $500,000,000.00. While the unjust enrichment that Arkla has obtained at Respondents' loss, damage, detriment and expense during this period of time undoubtedly only contributed to Arkla's net corporate profits in a most minor and insignificant manner, clearly Arkla's payment of compensatory damages for those actual losses and Arkla's return of the accumulated and insignificant unjust enrichment will also be a most minor and insignificant payment out of Arkla's own private fisc and accumulated corporate profits. In this connection Arkla on August 19, 1975 in a public

filing with the Federal Securities and Exchange Commission acknowledged that in connection with Respondents' contractual rights to recover compensatory damages and monetary reparations for the actual losses sustained and incurred by Respondents due to Arkla's continued breach of contract for fourteen years:

> "It should also be stated that plaintiffs' demand, if they should prevail on their principal claim, is estimated by the Company to be not more than $3,500,000.
>
> The reason this lawsuit was not reported in the prospectus is that, in our opinion, it is not 'material' in the sense in which the Commission uses the term in its rules with regard to the preparation of prospectuses. . . .
>
> We have no objection to describing the lawsuit in the prospectus; but since it is an action of the kind normally experienced in the business in which the Company is engaged, and it appears that a complete loss of the suit would not materially affect the Company or its prospects, we concluded that it should not be described in the prospectus."

Respondents respectfully submit that Arkla as the wrongdoer should have to pay for the actual losses and damages as caused by its own fault and wrongful breach of contract for fourteen years out of its own private fisc and accumulated corporate profits. However, if Arkla should now attempt to pass through any portion of the "not material" compensatory damages and monetary reparations as awarded to the Respondents herein as the result of the Louisiana Supreme Court's judgment in this case, the relevant public interest against excessive prices for dry or residue gas is

still fully protected not only by the fact that the Respondents' recoverable damages and reparations were measured by and limited to Respondents' contractually authorized prices for their liquid hydrocarbons and extracted plant products, the prices for which were never limited by the F.P.C.'s maximum ceiling rates, and to the contractually authorized prices for Respondents' dry or residue gas which were consistently and substantially *below* the maximum, lawful, just and reasonable area rate ceilings as previously established and approved by the F.P.C. in protecting the public from excessive prices, but also by the fact that Arkla must by means of a separate and subsequent administrative proceeding obtain the consent of the F.E.R.C. for any such proposed pass through by Arkla to its consumers in interstate commerce. Thus, the F.E.R.C. if called upon by Arkla can and will at that appropriate time exercise and perform its regulatory responsibility to further protect the relevant public interest. Unless and until the F.E.R.C. at Arkla's request authorizes and approves such a pass through, *not one penny* of the "not material" compensatory damages and reparations as awarded to Respondents in this case by the Louisiana Supreme Court can be passed through by Arkla to any of its consumers in interstate commerce. Hence, it is readily apparent that the F.E.R.C.'s regulatory responsibilities are not involved, affected or impaired by the Louisiana Supreme Court's decision in this breach of contract case and that the F.E.R.C. can at the appropriate time again fully exercise its regulatory responsibility if called upon by Arkla.

This same point involving the responsibility of courts to award compensatory damages and reparations for the actual losses caused by the breach and violation of private contractual rights on the one hand

and the regulatory responsibility of the Commission to protect consumers from excessive prices for natural gas sold in interstate commerce on the other hand was presented to and properly reconciled and resolved by the Courts and the Commission in the recent case of *Western Natural Gas Co. v. Cities Service Gas Co.*, 507 Pac.2d 1236 (Okla. 1972), appeal dismissed and cert. den., 409 U.S. 1052 (1972) and *Cities Service Gas Co.* v. *F.P.C.*, 535 F.2d 1278 (D.C. Cir. 1976). As this Court will recall, the Oklahoma Supreme Court awarded Western Natural Gas Company, "Western", a seller under a 1949 private gas sales contract that covered the sale of natural gas in interstate commerce and that was filed as part of a rate schedule under the Natural Gas Act with the F.P.C., compensatory damages and monetary reparations in the sum of $5,026,000.00 for the actual losses caused by Cities Service Gas Company's, "Cities", similar breach and violation of its private contractual duties and obligations to "cooperate" with Western as the pipeline purchaser under the 1949 private gas sales contract. In that case, like the instant case, the Oklahoma Supreme Court in light of the factual evidence found and concluded that Cities by withholding certain facts and its "cooperation" from Western had breached the contract and had improperly hindered, obstructed and precluded Western from timely filing for, obtaining and receiving the F.P.C.'s administrative approval necessary under the Natural Gas Act to abandon the 1949 gas sales contract and to subsequently sell its natural gas under new contracts at prices higher than those stipulated in the 1949 private gas sales contract on file with the Commission.

The Oklahoma Supreme Court, like the Louisiana Supreme Court in the instant case, applied a well established rule and principle of contract law, equity and justice to its factual and evidentiary findings and held that:

> "Cities, as an institution schooled in production, transmission and sale of natural gas, acquainted with the exigencies of FPC control of the interstate transmission and sale of natural gas, knew when it obstructed by misrepresentation and in bad faith, Western's effort to abandon service to Cities under the 1949 contract, that its obstructive efforts could not only defeat Western's abandonment application but would impede, if not completely defeat other necessary efforts to obtain FPC authorization and to make operating arrangements to deliver Western's gas to KPL. Cities will not be permitted to assert in its defense the delays which Cities itself has caused. Gulf Oil Corporation v. American Louisiana Pipe Line Company, supra. . . .
>
> . . .there is nothing speculative in the assertion that damage results when a producer's contractual opportunity to sell his gas at a higher price per mcf is defeated."

After the Oklahoma Supreme Court properly awarded Western compensatory damages and monetary reparations for the actual losses caused by Cities' continued breach of the 1949 private gas sales contract on file with the Commission and Cities' failure to "cooperate" with Western in prospectively obtaining the requisite governmental approval necessary to implement and fulfill the true purpose and intent of the contract as measured by the higher prices that Western could and would have received for its natural gas as

contractually authorized and consistent with the F.P.C.'s rules and regulations from 1963 to 1983, Cities then, like Arkla in the instant proceeding, appealed to and petitioned this Court to review and reverse the damage judgment of the Oklahoma Supreme Court on the basis that the Oklahoma Supreme Court had in resolving the breach of contract issue and in measuring and awarding compensatory damages purportedly invaded the exclusive regulatory jurisdiction of the F.P.C. to grant abandonment orders, to determine, fix and establish maximum, lawful, just and reasonable area rate ceilings for the sale of natural gas in interstate commerce and to protect the public from excessive prices for natural gas as sold in interstate commerce under the Natural Gas Act. See: *Cities Service Gas Co.* v. *Western Natural Gas Co.,* Docket No. 72-600, Supreme Court of the United States. This Court in light of its applicable and controlling decisions on December 11, 1972 properly *dismissed* Cities Service Gas Company's appeal and properly *denied* Cities Service Gas Company's petition for a writ of certiorari. See: *Cities Service Gas Co.* v. *Western Natural Gas Co.,* 409 U.S. 1052 (1972).

After the breach of contract case and award of compensatory damages had been finally and definitively concluded in the Courts, Cities in 1973 petitioned the F.P.C. for permission to pass through a portion of the damages as awarded Western by the Oklahoma Supreme Court to its consumers in interstate commerce. See: F.P.C. Docket No. RP 71-106 (1973 Phase). The F.P.C. in further exercising its regulatory responsibility to protect consumers in interstate commerce from excessive prices and costs for natural gas apparently in that proceeding determined that it would

in that case be consistent with the public interest for it to permit Cities to pass through and recover a portion of the damages from its customers in interstate commerce. In the review proceedings before the United States Court of Appeals for the District of Columbia Circuit, *Cities Service Gas Co.* v. *F.P.C.,* 535 F.2d 1278 (D.C. Cir. 1976), that court correctly noted and held:

> "In 1966 Western brought suit against Cities in the District Court of Oklahoma County, Oklahoma, alleging that Cities' opposition to Western's request for permission to abandon deliveries to Cities breached a continuing express and implied obligation to carry out the termination provisions of the 1949 contract and to cooperate in obtaining any necessary government approval. . . .
>
> In the Oklahoma suit Western's claim was for breach of contractual obligations . . . Although passage of the Natural Gas Act (specifically section 7(b)) may have given Cities an effective means by which it could frustrate El Paso's prior contractual rights and prevent Western from entering into a more lucrative arrangement with El Paso, the Oklahoma jury and courts found that the Act did not shield Cities from breach of contract liability. . .
>
> Western was entitled under Oklahoma law to Cities cooperation in seeking FPC authorization to abandon service to Cities, i.e., to a full and fair disclosure by Cities of the facts relevant to the FPC's determination of how the public interest could best be served. This was the holding of the Oklahoma courts and the consistent position of Western before those courts and the Commission.
>
> To be sure, the price per Mcf of Western's gas, if deliveries continued to Cities, was one important factor in the Oklahoma jury's determination of a proper measure of damages. However, other

equally important factors included the volume of Western's gas reserves; future operating expenses; future excise, property, and income taxes; and the discount factor used to compute present worth . . . the Oklahoma courts and the FPC were confronted with separate and distinct issues—the former involving Cities' responsibility in a breach of contract suit for damages caused to Western's leasehold interests and the latter involving Cities' obligations under the Natural Gas Act to pay the just and reasonable rate for gas severed and delivered to it. . .

In its 18 March order the FPC correctly distinguished between Cities' obligation under the Act to pay the just and reasonable rate for gas delivered to it (the issue before the Commission) and Cities' separate and independent obligation to respond in damages for private contractual breaches (the issue before the Oklahoma courts). . . . the Commission's order in Docket No. RP71-106 (1973 Phase), wherein the FPC approved a recovery by Cities from its customers of part of the Oklahoma court judgment."

Just as the Oklahoma Supreme Court properly and correctly resolved and adjudicated a private contractual damage dispute between Cities Service Gas Company and Western Natural Gas Company by applying well established rules and principles of contract law, equity and justice to the true and actual facts in that case, the Louisiana Supreme Court has in this case now properly resolved and adjudicated a similar private contractual damage dispute between Arkla and Respondents by applying these same well established rules and principles of contract law, equity and justice to the true and actual facts in this case. Just as the FPC at the proper time exercised its regulatory responsibility

to protect the relevant public interest when Cities Service Gas Company requested permission to pass through a portion of the damages to its consumers in interstate commerce, the F.E.R.C. can in connection with any subsequent attempt by Arkla to pass through any of the compensatory damages as awarded Respondents in this case to its consumers in interstate commerce properly exercise its regulatory responsibilities to further protect Arkla's interstate consumers at the appropriate time.

Unless and until the F.E.R.C. in the exercise of its regulatory responsibility to protect the public from excessive prices approves a request by Arkla to pass through some of the damages as awarded Respondents in this case, *none* of the damages may be passed through or recovered by Arkla from its consumers in interstate commerce.

IV. Arkla's Self-serving "Catch-22—Filed Rate Theory" by Means of Which It Attempts to Legally Take Advantage of Its Own Continued Breach of Contract and Misconduct for Fourteen Years and to Escape Its Contractual Liabilities Is Contrary to Well Established Rules and Principles of Law, Equity and Justice.

The undisputed evidence and final decision of the Louisiana Supreme Court below in this case establish beyond dispute that Arkla as Respondents' contractual obligor wrongfully injured and damaged Respondents for fourteen years by continuously breaching and violating Respondents' private contractual rights and by successfully misrepresenting, withholding and concealing all of the true, relevant and material facts from Respondents for fourteen years. Without question Arkla as the wrongdoer effectively obstructed, pre-

vented and precluded Respondents from timely discovering and obtaining any of the true, relevant and material facts necessary for Respondents to prospectively file for, implement, effectuate and enforce their private contractual rights to higher prices for their liquefiable hydrocarbons, gasoline, extracted plant products and their dry or residue natural gas as sold to Arkla under the subject private gas sales contract from 1961 through 1975, either administratively or judicially.

Specifically, with respect to the evidence in this case and the factual findings of all of the courts in this case, it is an inescapable fact that Arkla wrongfully and improperly rendered it impossible for Respondents to timely and prospectively prepare and file an administrative notice with the F.P.C. setting forth the relevant facts necessary to demonstrate their contractual entitlement to receive higher prices for their dry or residue natural gas as sold to Arkla from September, 1961 to October, 1972 (the time when Respondents became administratively classified as "small producers"), which contractually authorized prices were in fact well *below* the Commission's approved maximum, lawful, just and reasonable area rate ceilings. Likewise, Arkla as the wrongdoer for fourteen years absolutely prevented and precluded Respondents from prospectively taking any legal action necessary to protect and enforce their private contractual rights to receive and obtain higher prices for their liquefiable hydrocarbons, gasoline and extracted plant products as sold to Arkla under the 1952 contract by effectively mispresenting, withholding and concealing all of the true, relevant and material facts from Respondents for fourteen years.

Arkla, in borrowing still another theory from Cities Service Gas Company, asserts in this proceeding that because it successfully obstructed, prevented and precluded Respondents from prospectively filing for, effectuating and enforcing their private contractual rights, either administratively or judicially, for fourteen years Respondents have lost their fundamental legal right to judicially recover compensatory damages and monetary reparations for the actual losses and injuries caused and sustained as a direct result of Arkla's continued breach of contract and Arkla's effective concealment of the true facts from Respondents for fourteen years. Arkla's reuse of Cities Service Gas Company's "Catch 22—filed rate theory" is a non sequitur and in a case such as this where Arkla as the pipeline purchaser, like Cities Service Gas Company, has by its own continued breach of contract and misconduct prevented the prospective performance and fulfillment of the contract in a manner consistent with all applicable laws, rules and regulations this "theory" is completely abhorrent to well established rules of law, equity and justice. Clearly, Respondents could not make any administrative filings or take any action whatsoever as long as Arkla effectively withheld and successfully concealed all of the true, relevant and material facts from Respondents for fourteen years. The injustice of such a "theory" was properly recognized by the Courts in the *Cities Service Gas Company* cases, supra, and must again be recognized in the instant proceeding.

It is obvious that the Natural Gas Act and the filing procedures as provided for therein were predicated on the assumption that pipeline purchasers, such as Cities Service Gas Company and Arkla in this case, would always timely honor their contracts and prospectively

cooperate with sellers when necessary. Clearly, the Natural Gas Act does not contemplate, address or provide for the situation where a pipeline purchaser, such as Cities Service Gas Company and Arkla in this case, would wrongfully obstruct, prevent and preclude a seller from timely making any necessary filings with the Commission for fourteen years. Contrary to Arkla's borrowed, erroneous and self-serving contentions in this proceeding, Congress by enacting the Natural Gas Act never intended for the administrative filing procedures to be improperly frustrated and wrongfully used by pipeline purchasers to abrogate, escape and evade their legitimate contract obligations. Moreover, as repeatedly confirmed by this Court and numerous other courts of this Nation, Congress by enacting the Natural Gas Act never intended to abrogate or destroy the jurisdiction, power and authority of the courts to award compensatory damages and monetary reparations for the actual losses and damages caused by a pipeline purchaser's breach and violation of private contract rights and the improper frustration of the fulfillment of legitimate private contract rights in a manner consistent with the true intent of the contract and all applicable laws, rules and regulations. See: *Skelly Oil Co., et al* v. *Phillips Petroleum Co.,* 399 U.S. 667 (1950); *United Gas Pipe Line Co.* v. *Mobile Gas Corp.,* 350 U.S. 332 (1956); *Pan American Petroleum Corp.* v. *Superior Court,* 366 U.S. 656 (1961); *Gulf Oil Corp.* v. *American Louisiana Pipe Line Co.,* 282 F.2d 401 (6th Cir. 1960); *Western Natural Gas Co.* v. *Cities Service Gas Co.,* 507 Pac.2d 1236 (Okla. 1972), appeal dismissed and cert. den., 409 U.S. 1052 (1972); *Cities Service Gas Co.* v. *F.P.C.,* 535 F.2d 1278 (D.C. Cir. 1976); *State of Louisiana* v. *F.P.C.,* 503 F.2d 844 (5th

Cir. 1974); *Monsanto Co.* v. *F.P.C.,* 463 F.2d 799 (D.C. Cir. 1972); *International Paper Co.* v. *F.P.C.,* 476 F.2d 121 (5th Cir. 1973); *City of New Orleans, Louisiana* v. *United Gas Pipe Line Co.,* 390 F.Supp. 861 (E.D. La. 1974); and *Skelly Oil Co.* v. *F.P.C.,* 532 F.2d 177 (10th Cir. 1976).

In properly resolving and justly adjudicating the instant legal and contractual damage dispute between Respondents and Arkla, the Louisiana Supreme Court in its judgment dated March 5, 1979 correctly recognized and applied well established rules and principles of contract law, equity and justice to the true facts as established in this case when it expressly held that:

> *"We note, at the outset, that this controversy involves plaintiffs' claims for damages arising from defendant's breach of a gas purchase contract.* The claims herein are not founded upon any liability created by the Natural Gas Act, but, rather, are founded upon a private contract deriving its force and effect from state law. *There is no issue herein as to the reasonableness of the price, nor any attempt to adjudicate a proper rate, as defendant argues.* Issues involving contract violation were not made subject to the cognizance of the Federal Power Commission by the enactment of the Natural Gas Act. Pan American Petroleum Corp. v. Superior Court, 366 U.S. 656 (1961). The regulatory system of the Natural Gas Act is built upon private contracts, as modified by the Act, and the Act evinces no purpose to abrogate private gas purchase contracts. United Gas Pipe Line Co. v. Mobile Gas Service Corp., 350 U.S. 332 (1956). *A determination of the appropriate measure of compensatory damages due plaintiffs as a result of defendant's breach of a private contract is, we believe, a matter particularly within the purview of our state law and state courts. . .*

Article 2040, properly interpreted, means that the condition is considered fulfilled, when it is the debtor, bound under that condition who prevents the fulfillment. George W. Garig Transfer v. Harris, *supra;* Southport Mill v. Friedrichs, *supra;* Morrison v. Minton, *supra. This rule is but an application of the long-established principles of law that he who prevents a thing may not avail himself of the non-performance he has occasioned and that one should not be able to take advantage of his own wrongful act. See* Cox v. Department of Highways, 252 La. 22, 209 So. 2d 9 (1968) . . .

To realize this higher, contractually-authorized price, plaintiffs, pursuant to the Natural Gas Act, were required to file new rate schedules with the Commission. *However, plaintiffs were effectively precluded from making the requisite filings because they were not, at any time, informed by defendant that it was, in fact, paying a higher price to another party seller.* Although defendant was only bound to pay plaintiffs a higher price if plaintiffs filed new rate schedules with the Commission, *it is apparent that defendant prevented the fulfillment of that condition* (plaintiffs filing with the Commission) by failing to inform plaintiffs of its contractual arrangements with the United States government. Pursuant to article 2040 and this court's jurisprudence interpreting that article, the condition (that plaintiffs file new rate schedules) is considered fulfilled. *Hence, plaintiffs' failure to file the new rate schedules in no way precludes plaintiffs recovery of damages for the entire period of defendant's breach* (September 1961 through December 31, 1975) as measured by the difference in the price defendant paid the United States government and the price defendant paid plaintiffs. *To hold otherwise would be*

in clear contravention of the spirit and intent of article 2040 and the jurisprudence of this court.[6]

Footnote 6: We do not believe the debtor's bad faith or fraud (or lack thereof) is relevant to a determination of whether it has prevented the fulfillment of a condition under which it is bound. Planiol, in commenting upon the French counterpart of our article 2040, states, '[t]he act of the debtor, even when free from fraud, causes to the creditor a prejudice for which reparation is due, and the most complete reparation which can be offered to the creditor is the execution of the obligation, as if the condition had been accomplished. The act of the debtor can consist of any act whatsoever which prevents the realization of the condition.' 2 M. Planiol, Treatise on the Civil Law, No. 388 A (La. St. L. Inst. transl. 1959)." (Emphasis added)

Contrary to Arkla's erroneous assertions in this proceeding, the Respondents herein have a well established and fundamental legal right to be protected against and to be compensated for the actual losses and damages which they sustained and incurred for fourteen years because Arkla through its own "uncooperative", "evasive" and "not commendable" conduct continuously breached and violated Respondents' legitimate private contractual rights for fourteen years and effectively obstructed, prevented and precluded the timely and prospective implementation, effectuation and fulfillment of Respondents' private contractual rights in a manner fully consistent with the Natural Gas Act and the applicable rules and regulations of the F.P.C. for fourteen years by successfully misrepresenting, withholding and concealing all of the true, relevant and material facts from Respondents for fourteen years. Contrary to Arkla's erroneous assertions in this pro-

ceeding, well established rules and principles of law, equity and justice do not permit Arkla in defense of this case to legally rely upon the non-performance of the contract that it has caused by its continued breach of contract for fourteen years or to take advantage of its own "uncooperative", "evasive" and "not commendable" misconduct which effectively obstructed, prevented and precluded the prospective performance and fulfillment of the contract for fourteen years.

A brief review of the jurisprudence of this Nation completely refutes Arkla's erroneous contentions and clearly evidences the correctness, fairness and justness of the Louisiana Supreme Court's final judgment in this case, to wit:

(a) *United States* v. *Peck,* 102 U.S. 64 (1880):

> ". . . the conduct of one party to a contract which prevents the other from performing his part is an excuse for non-performance, see Addison, Cont., sec. 326; Fleming v. Gilbert, 3 Johns., 527. . . 'It is a sound principle that he who prevents a thing being done shall not avail himself of the non-performance he has occasioned.'."

(b) *Deitrick* v. *Greaney,* 309 U.S. 190 (1940):

> "It is a principle of the widest application that equity will not permit one to rely on his own wrongful act, as against those affected by it but who have not participated in it, to support his own asserted legal title or to defeat a remedy which except for his misconduct would not be available. See United States v. Dunn, 268 US 121, 133, 69 L ed 876, 882, 45 S Ct. 451; Independent Coal & Coke Co. v. United States, 274 US 640, 648, 71 L ed 1270, 1278, 47 S Ct 714."

(c) *Albemarle Paper Co.* v. *Moody,* 422 U.S. 405 (1975): "And where a legal injury is of an economic character,

> '[t]he general rule is, that when a wrong has been done, and the law gives a remedy, the compensation shall be equal to the injury. The latter is the standard by which the former is to be measured. The injured party is to be placed, as near as may be, in the situation he would have occupied if the wrong had not been committed.' Wicker v. Hoppock, 6 Wall 94, 99, 18 L Ed 752 (1867)."

(d) *Story Parchment Co.* v. *Paterson P. Paper Co.,* 282 U.S. 555 (1931):

> "As the supreme court of Michigan has forcefully declared, the risk of the uncertainty should be thrown upon the wrongdoer instead of upon the injured party. Allison v. Chandler, 11 Mich. 542, 550-556. . .
>
> '. . . And the adoption of any arbitrary rule in such a case, which will relieve the wrongdoer from any part of the damages, and throw the loss upon the injured party, would be little less than legalized robbery.'."

(e) *Watson Bros. Transportation Co.* v. *Jaffa,* 143 F.2d 340 (8th Cir. 1944):

> "But the Commission remains an administrative board exercising administrative power, and is not a court, and has no judicial power, although it has and exercises a quasi judicial power. 15 C.J.S., Commerce, § 141, p. 501. In the first volume of its reports, the Commission declared 'The power to enforce contracts is not one which has been confided to us', Traders, etc. v. Philadelphia, et., Co., J.C.C. 122, at page 131. . .

But a man's obligation under his lawful contract is not a whit less binding upon him because of the fact that an approval of the transaction must be had before the party to whom he has obligated himself can receive full benefits. . .

Such owners remain fully responsible in morals, law and equity on such undertakings as they enter into. . .

The mere fact that a contract or transfer is subject to the approval of a public agency is not a bar to a decree compelling a party to execute the documents necessary for the consummation of the contract. . .

'If petitioner has contracts * * * and if any of the matters related in this evidence it has been injured and wronged by the defendants, there are courts provided by law having jurisdiction to hear and determine controversies of that character.'."

(f) *Gridiron Steel Co.* v. *Jones & Laughlin Steel Corp.*, 361 F.2d 791 (6th Cir. 1966):

"A statement of this proposition is its refutation. Even where liability under a contract depends upon a condition precedent, one cannot avoid his liability by making the performance of the condition precedent impossible, or by preventing it. Lee Shops, Inc. v. Schatten-Cypress Co., 350 F.2d 12, 16 (6th Cir. 1965); Gulf Oil Co. v. American Louisiana Pipe Line Co., 282 F.2d 401 (6th Cir. 1960)."

(g) *Peter Kiewit Sons' Co.* v. *Summit Construction Co.*, 422 F.2d 242 (8th Cir. 1969):

"It is hornbook law that an implied provision of every contract is that neither party to the contract will do anything to prevent performance thereof by the other party or commit any act that will hinder or delay performance. Northeast Clackamas C.E. Co-op v. Continental Gas Co., 221 F.2d 329, 334 (9th Cir. 1955); George A. Fuller Co. v. United States, 69 F.Supp. 409, 411-12, 108 Ct.Cl. 70 (1947); Restatement of Contracts, § 315 (1) (1932)."

(h) *Ballard* v. *El Dorado Tire Co.*, 512 F.2d 901 (5th Cir. 1975):

"It is a principle of fundamental justice that if a promisor is himself the cause of the failure of performance, either of an obligation due him or of a condition upon which his own liability depends, he cannot take advantage of the failure.

In reflecting upon this jural proposition, a federal court has observed that 'Where liability under a contract depends upon a condition precedent one cannot avoid his liability by making the performance of the condition precedent impossible, or by preventing it.'. The illustration of this principle are legion. 5 Williston on Contracts § 677, pp. 224-225, quoting Gulf Oil Corp. v. American Louisiana Pipe Line Co., 6 Cir., 1960, 282 F.2d 401."

(i) *Ammerman* v. *Miller*, 488 F.2d 1285 (D.C. Cir. 1973):

"Deeply rooted in our jurisprudence is the rule applied by the District Court herein as enunciated in Coastal Oil Co. v. Eastern Tankers Seaways Corp., 29 N.J. Super. 565, 103 A.2d 26 (1954) as follows:

'It is well established as a principle of fundamental justice that if a promisor prevents or hinders the occurrence or fulfillment of a condition in a contract, and

the condition could have been fulfilled except for such hindrance or prevention on the part of the promisor, then the performance of the condition is excused and the liability of the promisor is fixed regardless of failure to fulfill the condition.' 103 A.2d 32.

See also United States v. Peck, 102 U.S. 64, 26 L. Ed. 45 (1880); Gulf Oil Corporation v. American Louisiana Pipe Line Co., 282 F.2d 401 (6th Cir. 1960); Tradewell Foods v. New York Credit Men's Adj. Bur., 179 F.2d 567 (2nd Cir. 1950); Restatement of Contracts, §§ 294, 295 (1932); 5 S. Williston, Contracts § 677 (3rd ed. 1961); 17A C.J.S. Contracts § 468b (1963)."

(j) *Christenson* v. *Felton,* 322 F.2d 323 (9th Cir. 1963):

"It has been good contract law that if the happening of such a condition is caused by the conduct of the promisor it will not terminate the duty of the promisor. (Restatement, Contracts § 302 (1932) and cf § 307) This is but an application of the established principle that equity will not permit one to rely on his own wrongful act. (Deitrick v. Greaney, 1940, 309 U.S. 190, 196, 60 S.Ct. 480, 84 L.Ed. 694) (Also see 3A Corbin, Contracts § 677 (3d ed. 1961))."

(k) *George W. Garig Transfer* v. *Harris,* 75 So.2d 27 (La. S.Ct. 1954):

". . 'It is clear, then, the law does not permit the party whose obligation depends on a condition, to allege the non-performance of that condition in defence, where it was through his fault it was not performed,' and 'It is a trite

and perfectly well established principle of jurisprudence, that no man can take advantage of his own wrong, and the law has been careful to make a special application of this maxim to cases where conditions form part of the contract. Coke on Littleton, 221-22. Digest, liv. 45, tit. 1, law 89. Pothier on Obligations, no. 212.' 3 La. at pages 502 and 501. Clearly, under the facts of this case, the defendant was without legal or moral right to withdraw from the joint application to secure the transfer from the Public Service Commission, and, by withdrawing, has brought about the failure to receive the approving Order of the Commission, since it is clearly stated in the ruling of that body that but for the withdrawal of the defendant, the transfer would have been approved."

(l) *Perrin* v. *Rodriguez,* 153 So. 555 (1934):

"A defendant who either intentionally or unknowingly 'succeeds in concealing from a creditor his cause of action cannot be allowed to reap the benefit of his own wrong.' (Syllabus No. 3). Hyman v. Hibernia Bank & Trust Company et al. 139 La. 411, 71 So. 598. See, also, Bernstein v. Commercial National Bank, 161 La. 38, 108 So. 117."

(m) *Gulf Oil Corp.* v. *American Louisiana Pipe Line Co.,* 282 F. 2d 401 (6th Cir. 1960):

"The District Judge further held that even if a permanent certificate had been contemplated by the parties, Gulf was still precluded from cancelling the contract. He found that Gulf, by its own conduct was instrumental in delaying and preventing the issuance of the permanent certificate by the Federal Power Commission prior to the expiration of the six month period.

Where liability under a contract depends upon a condition precedent one cannot avoid his liability by making the performance of the condition precedent impossible, or by preventing it. Suter v. Farmers Fertilizer Co., 100 Ohio St. 403, 411, 126 N.E. 304; Atlas Trading Corp. v. S. H. Grossman, Inc., 3 Cir., 169 F.2d 240; Corbin on Contracts § 1266 (1951 ed.). . .

Certainly Gulf may not rely on the delay which it brought about by its own conduct to justify its cancellation of the contract. It was obligated to do nothing which would hinder, delay or prevent the granting of its certificate within the time provided by the contract.

(n) *Western Natural Gas Co.* v. *Cities Service Gas* Co., 507 Pac.2d 1236 (Okla. 1972), appeal dismissed and cert. den., 409 U.S. 1052 (1972):

"This appeal by Cities Service Gas Company (Cities) seeks reversal of a judgment based upon a jury verdict against Cities in favor of Western Natural Gas Company . . . in the sum of $5,026,626 with interest thereon at 10% per annum from May 8, 1969, . . . Western claimed that Cities had breached implied obligations in a contract covering the sale of natural gas from Western to Cities resulting in damages to Western. . .

Cities says further that when Western in 1954 applied for and received under the Natural Gas Act a certificate of public convenience and necessity for the continued service to Cities, Western lost its right to maintain this action. . .

Here the FPC could not take remedial cognizance over Cities' contract violation.

We do not agree with Cities' contention that the trial court's judgment is an invasion of

the exclusive jurisdiction of the FPC. . . Issues involving contract violation were not made subject to the cognizance of FPC by the enactment of the Natural Gas Act. Pan American Petroleum Corporation v. Superior Court, 366 U.S. 656, 81 S.Ct. 1303, 6 L.Ed.2d 584; Gulf, supra.

Western's cause of action against Cities . . . is for violation of the implied contract obligation to make a fair and full disclosure of the facts relevant to FPC's determination of where the public interest lies and for having committed this violation in part by presenting objections without a substantial basis in fact and contrary to facts for the single purpose of serving the private corporate purposes of Cities '* * * in every contract there exists an implied covenant of good faith and fair dealings, and, more specifically, under such rule, the law will imply an agreement to refrain from doing anything which will destroy or injure the other party's right to receive the fruits of the contract.' 17A C.J.S. Contracts § 328, pp. 284-286. . .

Gulf Oil Corporation v. American Louisiana Pipe Line Co., C.A. 6th, 282 F.2d 401, at 404. . . The Court of Appeals said: 'Certainly Gulf may not rely on the delay which it brought about by its own conduct to justify its cancellation of the contract. *It was obligated to do nothing which would hinder, delay or prevent the granting of its certificate within the time provided by the contract.*' (emphasis supplied) And see 17A C.J.S. Contracts § 328, pp. 284-286, supported by notes 40.5 and 41. Moreover the regulatory system of the Natural Gas Act is built upon private contracts, as modified by the Natural Gas Act. United Gas Pipe Line Co. v. Mobile Gas Serv. Corp., 350 U.S. 332, 76 S.Ct. 373, 100 L.Ed. 373. . .

Cities, as an institution schooled in production, transmission and sale of natural gas, acquainted with the exigencies of FPC control of the interstate transmission and sale of natural gas, knew when it obstructed by misrepresentation and in bad faith, Western's effort to abandon service to Cities under the 1949 contract, that its obstructive efforts could not only defeat Western's abandonment application but would impede, if not completely defeat other necessary efforts to obtain FPC authorization and to make operating arrangements to deliver Western's gas to KPL. Cities will not be permitted to assert in its defense the delays which Cities itself has caused. Gulf Oil Corporation v. American Louisiana Pipe Line Company, supra. . .

. . . there is nothing speculative in the assertion that damage results when a producer's contractual opportunity to sell his gas at a higher price per mcf is defeated.

Finding no reversible error, we affirm the judgment of the trial court.

All Justices concur."

(o) *Cities Service Gas Co.* v. *F.P.C.*, 535 F.2d 1278 (D.C. Cir. 1976):

"In 1966 Western brought suit against Cities in the District Court of Oklahoma County, Oklahoma, alleging that Cities' opposition to Western's request for permission to abandon deliveries to Cities breached a continuing express and implied obligation to carry out the termination provisions of the 1949 contract and to cooperate in obtaining any necessary government approval. . .

In the Oklahoma suit Western's claim was for breach of contractual obligations. . . Although

passage of the Natural Gas Act (specifically section 7(b)) may have given Cities an effective means by which it could frustrate El Paso's prior contractual rights and prevent Western from entering into a more lucrative arrangement with El Paso, the Oklahoma jury and courts found that the Act did not shield Cities from breach of contract liability. . .

Western was entitled under Oklahoma law to Cities cooperation in seeking FPC authorization to abandon service to Cities, i.e., to a full and fair disclosure by Cities of the facts relevant to the FPC's determination of how the public interest could best be served. This was the holding of the Oklahoma courts and the consistent position of Western before those courts and the Commission.

To be sure, the price per Mcf of Western's gas, if deliveries continued to Cities, was one important factor in the Oklahoma jury's determination of a proper measure of damages. However, other equally important factors included the volume of Western's gas reserves; future operating expenses; future excise, property, and income taxes; and the discount factor used to compute present worth . . . the Oklahoma courts and the FPC were confronted with separate and distinct issues—the former involving Cities' responsibility in a breach of contract suit for damages caused to Western's leasehold interests and the latter involving Cities' obligations under the Natural Gas Act to pay the just and reasonable rate for gas severed and delivered to it. . .

In its March order the FPC correctly distinguished between Cities' obligation under the Act to pay the just and reasonable rate for gas delivered to it (the issue before the Commission) and Cities separate and independent ob-

ligation to respond in damages for private contractual breaches (the issue before the Oklahoma courts). . ."

(p) *Whitfield Const. Co., Inc.* v. *Commercial Devel. Corp.*, 392 F.Supp. 982 (1975):

"There is an implied condition in every contract that each party owes the other a duty to cooperate to the fullest, and cannot be heard to complain if it has violated that duty. Natking & Co. v. George A. Fuller Co., 347 F. Supp. 17 (W.D.Mo. 1972)."

See also: *Ohashi* v. *Verit Industries*, 536 F.2d 849 (9th Cir. 1976); *Keener* v. *Sizzler Family Steak Houses*, 424 F.Supp. 482 (N.D. Tex.1977); *Lee Shops, Inc.* v. *Schatten-Cypress Co.*, 350 F.2d (6th Cir. 1965); *Spanos* v. *Skouras Theatres Corp.*, 364 F.2d 161 (2nd Cir. 1966); *Foster* v. *Colorado Radio Corp.*, 381 F.2d 222 (10th Cir. 1967); *Callon Petroleum Co.* v. *Big Chief Drilling Co.*, 548 F.2d 1174 (5th Cir. 1977); *Concrete Specialties* v. *H. C. Smith Construction Co.*, 423 F.2d 670 (10th Cir. 1970); *Kentucky Skilled Craft Guild* v. *General Electric Co.*, 431 F.2d 62 (6th Cir. 1970); *C. H. Codding & Sons* v. *Armour and Co.*, 404 F.2d 1 (10th Cir. 1968); *Ace Construction Co.* v. *W. H. Nichols & Co., Inc.*, 353 F.2d 110 (10th Cir. 1965); *Ryder Truck Rental, Inc.* v. *Central Packing Co.*, 341 F.2d 321 (10th Cir. 1965); *Matter of Fabric Tree*, 426 F.Supp. 872 (S.D.N.Y. 1977); *Waters* v. *Key Colony East, Inc.*, 345 So.2d 367 (Fla. 1977); *Transnational Insurance Co.* v. *Rosenlund*, 261 F.Supp. 12 (D.Or. 1966); *Galfand* v. *Chestnutt*, 402 F.Supp. 1318 (S.D. N.Y. 1975); *Glassman Const. Co., Inc.* v. *Maryland City Plaza, Inc.*, 371 F.Supp. 1154 (D.Md. 1974); *Old Dutch Farms, Inc.* v. *Milk Drivers & Dairy Emp. U. Local 584*, 222 F.Supp. 125 (1963); *Casale* v. *Carrigan and Boland, Inc.*, 288 So.2d 299 (La.App. 1974); *Groghan* v. *Billingsley*, 313 So.2d 255 (La.App. 1975); *Briggs* v. *Siggio*, 285 So.2d 324 (La.App. 1976); and *Chartres Corp.* v. *Charles Carter & Co., Inc.*, 346 So.2d 796 (La.App. 1977).

The Louisiana Supreme Court by correctly recognizing and applying these same well established rules and fundamental principles of contract law, equity and justice to the true and actual facts as established in this case has properly held that Arkla as the wrongdoer may not avail itself of the non-performance of the contract that it has occasioned for fourteen years and that Arkla may not legally take advantage of its own wrongful misconduct for fourteen years in defense of this case. The Louisiana Supreme Court by correctly applying these same well established rules and principles of contract law, equity and justice to the true facts in this case has in the final analysis properly resolved and justly adjudicated a private contractual damage dispute between Respondents and Arkla and the final judgment of the Louisiana Supreme Court in this case correctly recognized and enforced Arkla's separate and independent contractual obligations to respond in compensatory damages and reparations for the actual losses and damages caused by Arkla's wrongful and continued breaches and violations of Respondents' private contractual rights for fourteen years. In light of the true and actual facts of this case, fundamental rules and principles of contract law, equity and justice and proper analysis, it is clear that the final judgment of the Louisiana Supreme Court in this case does justice to the parties in this lawsuit and does *not* involve or affect any real or substantial federal questions.

CONCLUSION

In light of the true and actual facts of this case and applicable and controlling rules and principles of contract law, equity and justice, Arkla's petition for a writ of certiorari should be denied.

Respectfully submitted,

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April, 1979

APPENDIX

APPENDIX I.

(March 5, 1979 Judgment of Louisiana Supreme Court)

SUPREME COURT OF LOUISIANA

No. 62,560

FRANK J. HALL, ET AL

v.

ARKANSAS-LOUISIANA GAS COMPANY

On Writ of Certiorari to the Second Circuit Court of Appeal Parish of Caddo, State of Louisiana

MARCUS, *Justice**

Plaintiffs, royalty interest owners, working interest owners, overriding royalty interest owners and unleased mineral interest owners, instituted this suit against Arkansas-Louisiana Gas Company to recover damages arising from an alleged breach of a gas purchase contract.

Plaintiffs, in their original and amended and supplemental petitions, alleged that on January 11, 1952, they, or their respective ancestors in title, entered into a gas purchase agreement with defendant wherein plaintiffs agreed to sell to defendant their natural gas, and the natural gas owned by their respective lessors, produced from certain described lands in the Sligo Gas Field, Bossier Parish, Louisiana. This agreement, by its terms, was to continue in effect from January 11, 1952, through June 1, 1980. Under the terms and provisions of this agreement, defendant was to pay a fixed schedule of prices for the natural gas delivered to it from plaintiffs. This agreement also contained a price adjustment provision, commonly referred to as a favored nations clause, which provided in pertinent part:

> If at any time during the term of this agreement Buyer should purchase from another party seller gas

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* Chief Judge William A. Culpepper participated in this decision as Associate Justice Ad Hoc sitting in the place of Chief Justice Sanders, retired.

> produced from the subject wells or any other well or wells located in the Sligo Gas Field at a higher price than is provided to be paid for gas delivered under this agreement, then in such event the price to be paid for gas thereafter delivered hereunder shall be increased by an amount equal to the differences between the price provisions hereof and the concurrently effective higher price provisions of such subsequent contract. . . . It is agreed that any such higher price for gas delivered hereunder shall be effective on the first day of Buyer's accounting month (as elsewhere herein defined) next following the effective date of such subsequent contract, all subject, however, to any rules and regulations of the Office of Price Stabilization or any other regulatory body having jurisdiction.

Plaintiffs alleged that since January 11, 1952, they and their respective lessors, have sold substantial quantities of natural gas produced from wells in the Sligo Gas Field to defendant at the prices stipulated in the fixed schedule of prices as contained in the agreement. Plaintiffs further alleged that from September 1961 until the date of the institution of this action, defendant purchased from another party seller (the United States government) natural gas produced from wells located in the Sligo Gas Field at a higher price (including prices paid for both the residue or dry gas and the liquid hydrocarbons or plant products extracted from the United States government's gas delivered to defendant's pipeline system) than it was paying to plaintiffs pursuant to the January 11, 1952 gas purchase agreement for plaintiff's dry or residue gas and liquid hydrocarbons or plant products extracted from plaintiff's gas and delivered into defendant's pipeline system. By paying a higher price to another party seller for natural gas produced from wells in the Sligo Gas Field, plaintiffs contended that defendant activated the provisions of the favored nations clause and legally obligated itself to advise

plaintiffs of these facts and pay plaintiffs the higher price being paid to another party seller (the United States government) for natural gas produced from wells in the Sligo Gas Field. Plaintiffs contended that they were entitled to such higher price from the first time defendant paid such higher price to another party seller. Plaintiffs averred that defendant had at no time during the existence of the January 11, 1952 agreement informed plaintiffs, or any of their representatives, of the fact it had been paying a higher price to another party seller for natural gas produced from wells in the Sligo Gas Field. Plaintiffs thus argued that defendant had breached the favored nations clause of their agreement by failing to pay plaintiffs a price equal to the highest price paid by defendant to any other party seller for natural gas produced from wells in the Sligo Gas Field. Plaintiffs sought damages equal to the difference between the price paid to them and the highest price paid by defendant to any other party seller for such natural gas during the period of time that defendant purchased natural gas from the United States government.

In its answer, defendant admitted that it purchased substantial quantities of natural gas from plaintiffs pursuant to the January 11, 1952 gas purchase agreement. Defendant, however, averred that it had not at any time paid anyone a price higher than that paid plaintiffs for natural gas purchased from the Sligo Gas Field and it specifically denied that it was purchasing any natural gas produced from the Sligo Gas Field from the United States government. Further answering the petition, defendant alleged that the only contract between it and the United States government relating to the production of natural gas from the Sligo Gas Field was an oil, gas, and mineral lease dated January 23, 1961, and executed by the United States Department of the Interior in favor of Union Producing Co. and covering land situated in the Sligo Gas Field. Defendants averred that it acquired an undivided 15% interest in this lease by virtue of an assignment from Union Producing Co. on

January 30, 1961, and argued that this lease did not constitute an offer or contract to sell natural gas, but, rather, granted defendant only the right to explore for, remove, and dispose of oil and gas. Hence, defendant contended, the only payments made by it to the United States government were the payments of royalty (based on the value of the natural gas and other products extracted from the natural gas) as provided in the lease and not payments for the purchase of natural gas from the United States government.

By supplemental and amended answer, defendant further alleged that the Federal Power Commission, pursuant to the provisions of the Natural Gas Act (15 U.S.C. § 717 a-w) had sole jurisdiction over the sale of natural gas by plaintiffs to defendant under the January 11, 1952 gas purchase agreement upon which this action was founded. Defendant contended that, pursant to 15 U.S.C. § 717 c(d),[1] plaintiffs were required to file and give notice of any proposed increase of rates, including any contractually-authorized rate increase, above the authorized initial rate and that, as plaintiffs had failed to file for such rate increase allegedly allowable under the favored nations clause, they

[1] 15 U.S.C. § 717c(d) provides:

> Unless the Commission otherwise orders, no change shall be made by any natural-gas company in any such rate, charge, classification, or service, or in any rule, regulation, or contract relating thereto; except after thirty days' notice to the Commission and to the public. Such notice shall be given by filing with the Commission and keeping open for public inspection new schedules stating plainly the change or changes to be made in the schedule or schedules then in force and the time when the change or changes will go into effect. The Commission, for good cause shown, may allow changes to take effect without requiring the thirty days' notice herein provided for by an order specifying the changes so to be made and the time when they shall take effect and the manner in which they shall be filed and published.

were not lawfully authorized to collect the increased rate in this action. In addition, defendant averred that one of the named plaintiffs, W. E. Hall, Jr., executed, on May 25, 1969, an amendment to the gas purchase agreement of January 11, 1952, which deleted the favored nations clause from his contract with defendant. In view of this amendment, defendant contended that W. E. Hall, Jr. had no cause or right of action for any claim against defendant arising on or after May 25, 1969.

The trial court first held that payments made by defendant to the United States government under the terms of the lease constitued a "purchase from another party seller" within the meaning of the favored nations clause contained in the January 11, 1952 gas purchase contract entered into between plaintiffs and defendant. The court reasoned that defendant, in making payments to the United States government under its lease, was acting in a dual capacity: it was paying royalty as lessee and purchasing gas as pipeline purchaser. The court determined that defendant failed to advise plaintiffs of this fact or pay them the higher, contractually-authorized price. Having held that defendant breached the original gas purchase contract, the trial court next concluded that defendant would only be liable for damages (measured by the difference between the price paid the United States government and the price paid plaintiffs) for the period subsequent to the issuance of small producer certificates to plaintiffs in October 1972. The court reasoned that plaintiffs could not recover a "raise in prices" for the period prior to October 1972 because they had never obtained approval of a higher rate or price from the Federal Power Commission as required by 15 U.S.C. § 717 c-d. The trial judge noted, however, that the regulations of the Commission (18 C.F.R. § 157.40) provide that a "small producer," as defined in the regulations, may obtain a small producer certificate from the Commission exempting it from the necessity of filing a rate

schedule in order to obtain contractually-authorized rate increases if the rate increase does not exceed the ceiling rate set by the Commission. The trial judge determined that plaintiffs had obtained such "small producer certificates" in October 1972 and concluded that plaintiffs would be entitled to a recovery of damages from the period from October 1972 through December 1975. The trial court then determined that, because W. E. Hall, Jr. amended his contract with defendant on May 25, 1969, and deleted the favored nations clause from his contract, he had no claim against defendant under the favored nations clause subsequent to May 25, 1969, and would be entitled to no recovery of damages.

The court of appeal affirmed the trial court, holding that defendant had breached the favored nations clause of its contract with plaintiffs and that plaintiffs were entitled to damages measured by the difference between the price paid by defendant to the United States government and the price paid to plaintiffs (after applying adjustments for pertinent factors) only for the period from October 1, 1972 through December 31, 1975.[2] In addition, the court of appeal held that W. E. Hall, Jr. had waived any claim for damages against defendant for the period subsequent to May 25, 1969, by entering into an amended contract with defendant on that date which deleted the favored nations clause from his contract.[3]

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[2] The court of appeal found that the calculations used by the trial judge to determine the amount of damages for the period from October 1, 1972 through December 31, 1975 were based on plaintiffs' calculations representing the entire period of the breach (September 1961 through December 31, 1975). The appellate court thus ordered the case remanded for a new trial restricted to the assessment of damages.

[3] 359 So. 2d 255 (La. App. 2d Cir. 1978).

We denied defendant's application for a writ to review the correctness of the court of appeal's decision.[4] However, on application of plaintiffs, we granted a writ limited to a consideration of whether the court of appeal was correct in denying an award of damages to plaintiffs for the period of defendant's breach prior to October 1972 and whether it was correct in holding that W. E. Hall, Jr. "waived" any claim for damages against defendant by entering into an amended contract on May 25, 1969, which deleted the favored nations clause from his contract.[5]

We note, at the outset, that this controversy involves plaintiffs' claims for damages arising from defendant's breach of a gas purchase contract. The claims herein are not founded upon any liability created by the Natural Gas Act, but, rather, are founded upon a private contract deriving its force and effect from state law. There is no issue herein as to the reasonablenes of the price, nor any attempt to adjudicate as proper rate, a defendant argues. Issues involving contract violation were not made subject to the cognizance of the Federal Power Commission by the enactment of the Natural Gas Act. Pan American Petroleum Corp. v. Superior Court, 366 U.S. 656 (1961). The regulatory system of the Natural Gas Act is built upon private contracts, as modified by the Act, and the Act evinces no purpose to abrogate private gas purchase contracts. United

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[4] 362 So. 2d 1120 (La. 1978). It is well settled that, when both parties apply for a writ of review, this court's denial of the application made by one of the parties constitutes our final determination upon the matters included therein. This court then will not pass a second time upon these matters at the hearing on review granted through the application of the other party. Jordan v. Travelers Insurance Company, 257 La. 995, 245 So. 2d 151 (1971). Hence, any questions relating to the determinations made by the courts below that defendant breached the favored nations clause of its gas purchase contract with plaintiffs are not now before us.

[5] 362 So. 2d 798 (La. 1978).

Gas Pipe Line Co. v. Mobile Gas Service Corp., 350 U.S. 332 (1956). A determination of the appropriate measure of compensatory damages due plaintiffs as a result of defendant's breach of a private contract is, we believe, a matter paricularly within the purview of our state law and state courts.

It is conceded by the parties before us that plaintiffs' recovery of damages arising from defendant's breach of the contract is to be measured by the difference between the price paid by defendant to the United States government and the price paid by it to plaintiffs (after adjustment for pertinent factors as indicated in the court of appeal opinion). The first issue presented for our resolution is a determination of whether plaintiffs are entitled to a recovery of the difference between such prices for the entire period of defendant's breach of the contract (September 1961 through December 31, 1975) or whether plaintiffs are precluded from a recovery of damages representing the period prior to October 1972.

Unless the Federal Power Commission otherwise orders, no change shall be made by any natural gas company in any rate received by it for or in connection with the transportation or sale of natural gas subject to the jurisdiction of the Commission, or contract relating thereto, except after thirty days' notice to the Commission and to the public. 15 U.S.C. § 717 c(a) & (d). Such notice shall be given by filing with the Commission and keeping open for public inspection new schedules stating plainly the change or changes to be made in the schedule or schedules then in force and the time when such changes will go into effect. *Id.* (d). A "small producer" (as defined by the Commission's regulations) may obtain a "small producer certificate" exempting it from the requirement of having to file a rate schedule as long as the increase in rate does not exceed the ceiling rate set by the Commission. *See* 18 C.F.R. § 157.40. Several of the plaintiffs obtained "small

producer certificates" in October 1972, and the certificates issued to those parties were made effective as to all plaintiffs by order of the Commission. It is not disputed by the parties before us that the only rate schedule ever filed by plaintiffs with the Commission was the original gas purchase contract entered into on January 11, 1952. The trial court and court of appeal denied plaintiffs an award of damages arising from defendant's breach of contract for the period of time (*i.e.*, prior to October 1972) during which plaintiffs were required to file new rate schedules with the Commission reflecting their entitlement under the contract, to a higher price for their natural gas sold to defendant.

La. Civ. Code art. 2040 provides:

> The condition is considered as fulfilled, when the fulfillment of it has been prevented by the party bound to perform it.

It is difficult to attach a precise meaning to the rule as it is literally set forth in the text of article 2040. This court, however, has long recognized that the English translation of this provision from the French articles as written in the Louisiana Civil Codes of 1825 (article 2035) and 1808 (article 78) is inaccurate and the French text has always prevailed in decisions of this court. *See* George W. Garig Transfer v. Harris, 226 La. 117, 75 So. 2d 28 (1954); Southport Mill v. Friedrichs, 171 La. 786, 132 So. 346 (1931); Morrison v. Minton, 163 La. 1065, 113 So. 456 (1927); Walls v. Smith, 3 La. 498 (1832) (dissenting opinion). Article 2040, properly interpreted, means that the condition is considered fulfilled, when it is the debtor, bound under that condition, who prevents the fulfillment. George W. Garig Transfer v. Harris, *supra;* Southport Mill v. Friedrichs, *supra;* Morrison v. Minton, *supra.* This rule is but an application of the long-established principles of law that he who prevents a thing may not avail himself of the nonperformance he has occasioned and that one should not be

able to take advantage of his own wrongful act. *See* Cox v. Department of Highways, 252 La. 22, 209 So. 2d 9 (1968).

The favored nations clause of the contract entered into between plaintiffs and defendant provided that, if defendant purchased from another party seller gas produced from any wells located in the Sligo Gas Field at a higher price than was provided to be paid for plaintiffs' gas, defendant was bound to pay plaintiffs for the gas delivered under their contract at a price increased by an amount equal to the differences between the price provisions of plaintiffs' contract with defendant and the cor rently effective higher price provisions of defendant's contract with the other party seller. To realize this higher, contractually-authorized price, plaintiffs, pursuant to the Natural Gas Act, were required to file new rate schedules with the Commission. However, plaintiffs were effectively precluded from making the requisite filings because they were not, at any time, informed by defendant that it was, in fact, paying a higher price to another party seller. Although defendant was only bound to pay plaintiffs a higher price if plaintiffs filed new rate schedules with the Commission, it is apparent that defendant prevented the fulfillment of that condition (plaintiffs filing with the Commission) by failing to inform plaintiffs of its contractual arrangements with the United States government. Pursuant to article 2040 and this court's jurisprudence interpreting that article, the condition (that plaintiffs file new rate schedules) is considered fulfilled. Hence, plaintiffs' failure to file the new rate schedules in no way precludes plaintiffs recovery of damages for the entire period of defendant's breach (September 1961 through December 31, 1975) as measured by the difference in the price defendant paid the United States government and the price defendant paid plaintiffs. To hold otherwise would be in clear contravention of the spirit

and intent of article 2040 and the jurisprudence of this court.[6]

The court of appeal also reasoned that plaintiffs' recovery of damages for the period of defendant's breach prior to October 1972 must be denied because such recovery would necessarily assume that a price increase would have been granted by the Commission. The appellate court concluded that the issue as to whether such approval would have been grantd by the Commission was highly speculative and could not serve as a basis for an award of damages.

Actual damages arising from a breach of contract must be proven; they cannot be merely speculative or conjectual. Brown v. Producers' Oil Co., 134 La. 672, 64 So. 674 (1914). It must appear reasonably certain that the amount of damages rests upon a certain basis. Brown v. Producers' Oil Co., *supra*. Such proof need be only by a preponderance of the evidence; proof by direct or circumstantial evidence is sufficient to constitute a preponderance when, taking the evidence as a whole, such proof shows that the facts or causation sought to be proved is more probable than not. *Cf.* Jordan v. Travelers Insurance Co., 257 La. 995, 245 So. 2d 151 (1971). The sufficiency of proof of damages must be determined in relation to the particular contract at issue and the circumstances surrounding its breach. The question of the certainty of proof of damages becomes a

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[6] We do not believe the debtor's bad faith or fraud (or lack thereof) is relevant to a determination of whether it has prevented the fulfillment of a condition under which it is bound. Planiol, in commenting upon the French counterpart of our article 2040, states, "[t]he act of the debtor, even when free from fraud, causes to the creditor a prejudice for which reparation is due, and the most complete reparation which can be offered to the creditor is the execution of the obligation, as if the condition had been accomplished. The act of the debtor can consist of any act whatsoever which prevents the realization of the condition." 2 M. Planiol, Treatise on the Civil Law, No. 388 A (La. St. L. Inst. transl. 1959).

matter for decision in each individual case. Angelloz v. Humble Oil & Refining Co., 196 La. 604, 199 So. 656 (1940).

At trial, a November 8, 1976 order of the Commission was produced which indicated the maximum rates to which plaintiffs would have been entitled if contractually authorized and *if* proper filing procedures had been followed (Exhibit D-59). The Commission clearly indicated in its order that it would have approved such rates. No evidence was adduced by defendant to establish that Commission approval would have been unlikely. It is our opinion that, taking the evidence as a whole, plaintiffs' proof shows that it was more probable than not that the Commission would have approved a contractually-authorized price increase if the proper filing procedures had been followed. It appears reasonably certain that the amount of damages claimed by plaintiffs rests upon a certain basis.[1]

In sum, it is our opinion that plaintiffs are entitled to a recovery of an award of damages measured by the difference between the price defendant paid the United States government and the price defendant paid plaintiffs (after applying various adjustments for pertinent factors) for the entire period of defendant's breach of contract from September 1961 through December 31, 1975.

We must next determine whether W. E. Hall, Jr. waived any claim against defendant for damages arising on and after May 25, 1969, because, on that date, he entered into a contract with defendant wherein he deleted the favored nations clause from the January 11, 1952 agreement. Plaintiffs argue that Hall executed the May 25, 1969 agreement without being informed by defendant that it had activated the favored nations clause of the original agreement and

[1] We note that plaintiffs make no claim that they would have been entitled to a price increase under their contract in excess of the respective area base rate ceilings for sales of natural gas as established by order of the Commission.

that defendant misrepresented facts to Hall by informing him that it was paying plaintiffs the highest prices that it was paying any other party sellers for gas produced from the Sligo Field. Plaintiffs contend the May 25, 1969 agreement is void because Hall executed it under an error of fact.

Hall's testimony indicates that in 1969 he possessed an interest in a well (referred to as the Harvey well) under contract to Texas Gas Producing Company (Texas) with the natural gas produced therefrom being sold to Texas. In 1969, the Harvey well was nearly depleted and its pressure was dropping. The pressure on the Texas pipeline serving the Harvey well was too high for such gas to be carried through the pipeline. Hall stated that he was confronted with a situation where he was either going to have to "junk the well," buy a compressor and continue selling to Texas, or obtain a release from Texas and sell to another party with a lower pipeline pressure. After learning that the pressure on defendant's pipeline was lower than that on Texas' pipelines, Hall obtained a release from Texas and negotiated with defendant to take the gas from the Harvey well. An agreement was executed wherein defendant amended the January 11, 1952 gas purchase agreement to also cover Hall's share of the production from the Harvey well. This amendment also deleted the favored nations clause from the January 11, 1952 gas purchase contract. Hall maintained that had he been aware of the fact that defendant was paying a higher price to another party seller in the Sligo Field, he would not have agreed to the deletion of the favored nations clause. Hall also stated that his primary purpose is executing the May 25, 1969 agreement with defendant was to avoid having to purchase and operate a compressor and to be able to continue selling gas from the Harvey well.

Consent of the parties legally given is a requisite to the validity of a contract. La. Civil Code art. 1779. Consent

being the concurrence of intention in two or more persons, with regard to a matter understood by all, reciprocally communicated, and resulting in each party from a free and deliberate exercise of the will, it follows that there is no consent where it has been produced by error. La. Civil Code art. 1819. An error of fact proceeds either from ignorance of that which really exists, or from a mistaken belief in the existence of that which has none. La. Civil Code art. 1821. Errors may exist as to all the circumstances and facts which relate to a contract, but it is not every error that will invalidate it. La. Civil Code art. 1823. To have that effect, the error must be in some point, which was a principal cause for making the contract and when there are several this principal cause is called the *motive* and means that consideration without which the contract would not have been made. *Id.* & art. 1825. No error in the motive can invalidate a contract, unless the other party was apprised that it was the principal cause of the agreement, or unless from the nature of the transaction it must be presumed that he knew it. La. Civil Code art. 1826. These articles of our Code simply mean that error in the determining motive, or principal cause, of a contract vitiates consent and invalidates the contract. Error as to a subsidiary motive has no effect upon the validity of the contract. Cryer v. M & M Manufacturing Co., Inc., 273 So. 2d 818 (La. 1972); Stack v. Irwin, 246 La. 777, 167 So. 2d 363 (1964); Carpenter v. Skinner, 224 La. 848, 71 So. 2d 133 (1954).

A review of the record convinces us that the error relied upon by plaintiffs to invalidate the May 25, 1969 agreement was not an error in the determining motive, or principal cause, of the agreement. Hall's testimony clearly indicates that the determining motive, or principal cause, of the agreement was his desire to continue selling gas from the Harvey well and to avoid purchasing and operating a compressor for the Harvey well. Any error relating to the

issue as to whether defendant had activated the favored nations clause of the original agreement was only error as to a subsidiary motive and has no effect upon the validity of the May 25, 1969 agreement. Hence, we determine that the May 25, 1969 agreement is not invalid as having been executed by Hall under an error of fact.

We construe plaintiffs' allegations as a contention that the misrepresentations and omissions of defendant invalidated the contract because they constituted fraud.

Fraud, as applied to contracts, is the cause of an error bearing on a material part of the contract, created or continued by artifice, with design to obtain some unjust advantages to the one party, or to cause an inconvenience or loss to the other. La. Civil Code art. 1847. Two elements are essential to constitute legal fraud: the intention to defraud and loss or damage or a strong probability of loss or damage. Buxton v. McKendrick, 223 La. 62, 64 So. 2d 844 (1953). It is well settled that one who alleges fraud has the burden of establishing it by legal and convincing evidence since fraud is never presumed, and that to establish fraud exceptionally strong proof must be adduced. Buxton v. McKendrick, *supra;* Sanders v. Sanders, 222 La. 223, 62 So. 2d 284 (1952).

The trial court made no finding that defendant fraudulently concealed or misrepresented facts relating to its activation of the favored nations clause. The court of appeal, in affirming the trial court's determination on this issue, found the evidence insufficient to support plaintiffs' allegation of fraud. We have reviewed the record and it is our opinion that the determination made by the lower courts on this issue is correct. Plaintiffs failed to prove that defendant possessed the requisite intent to defraud.[8] Hence,

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[8] In fact, it appears that the deletion of the favored nations clause from the original agreements was an effort by defendant to comply with the orders and regulations of the Federal Power Commission. By Order No. 232 A (25 F.P.C. 609), issued March 31,

the May 25, 1969 agreement executed by W. E. Hall, Jr. cannot be invalidated on the basis of alleged fraudulent conduct of defendant.

In sum, we conclude that the May 25, 1969 amendment to the original gas purchase contract executed by W. E. Hall, Jr. is a valid and enforceable agreement. Since the effect of this agreement was to delete the favored nations clause from the original contract, W. E. Hall, Jr. has no claims for damages against defendant arising on or after May 25, 1969.

DECREE

For the reasons assigned, judgment of the court of appeal is amended to allow plaintiffs (except W. E. Hall, Jr.) an award of damage measured by the difference between the price paid the United States government and the price defendant paid plaintiffs for the entire period of defendant's breach of contract from September 1961 through December 31, 1975; W. E. Hall, Jr.'s recovery of damages against defendant is to be measured for the period of time from September 1961 through May 24, 1969. The case is remanded to the district court for assessment of damages in accordance with the views herein expressed.

1961, the Commission amended its regulations so as to provide that indefinite price escalation clauses (including favored nations clauses) in sales contracts executed on or after April 3, 1961, for the sale or transportation of natural gas subject to the jurisdiction of the Commission would be inoperative and of no effect at law. By Order No. 242 (27 F.P.C. 339), issued February 8, 1962, the Commission further amended its regulations to provide for the rejection of contracts containing such indefinite escalation clauses. *See* 18 C.F.R. §§ 154.93, 157.14 and 157.25.

SUPREME COURT OF LOUISIANA

No. 62560

FRANK J. HALL ET AL.

Versus

ARKANSAS-LOUISIANA GAS COMPANY

DIXON, *Justice* (concurring)

I fully subscribe to the opinion, but believe C. C. 2040 is applicable only by analogy, and that C. C. 2040 is probably a clarification of the original French text, not an "inaccurate" translation.

APPENDIX J.

(April 9, 1979 Order of Louisiana Supreme Court Denying Arkla's "Application for a Rehearing")

SUPREME COURT OF LOUISIANA
NEW ORLEANS, 70112
FOR IMMEDIATE NEWS RELEASE

On the 9th day of April, 1979, the following action was taken by the Supreme Court of Louisiana in the case listed below:

• • •

REHEARINGS DENIED:

• • •

62,560 HALL v. ARK-LA. GAS

Supreme Court, U. S.
FILED
JAN 29 1979
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-986

ARKANSAS LOUISIANA GAS COMPANY, *Petitioner,*

v.

FRANK J. HALL, MRS. W. E. HALL, SR., THE H. M. HARRELL TESTAMENTARY TRUST, JAMES E. HARRELL, JOHN K. HARRELL, SR., ASA BENTON ALLEN, SIDNEY G. MYERS, JR., W. O. COCHRAN, THOMAS F. PHILYAW, MRS. ELAINE ALLEN, JAMES A. NOE, D. B. MCCONNELL, MRS. EVA L. WEISS, SOL KAPLAN and NATIONAL AMERICAN BANK, New Orleans, Co-Testamentary Executors of the SUCCESSION OF SEYMOUR WEISS, *Respondents.*

PETITIONER'S REPLY TO RESPONDENTS' BRIEF OPPOSING PETITION FOR A WRIT OF CERTIORARI

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IN THE

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FRANK J. HALL, MRS. W. E. HALL, SR., THE H. M. HARRELL TESTAMENTARY TRUST, JAMES E. HARRELL, JOHN K. HARRELL, SR., ASA BENTON ALLEN, SIDNEY G. MYERS, JR., W. O. COCHRAN, THOMAS F. PHILYAW, MRS. ELAINE ALLEN, JAMES A. NOE, D. B. MCCONNELL, MRS. EVA L. WEISS, SOL KAPLAN and NATIONAL AMERICAN BANK, New Orleans, Co-Testamentary Executors of the SUCCESSION OF SEYMOUR WEISS, *Respondents.*

PETITIONER'S REPLY TO RESPONDENTS' BRIEF OPPOSING PETITION FOR A WRIT OF CERTIORARI

A. RESPONDENTS' BRIEF DOES NOT ADDRESS ITSELF TO THE FACTS OF THIS CASE AS DETERMINED BY THE LOUISIANA COURT OF APPEAL.

Respondents' brief is addressed to a case materially different from this case. Respondents ignore the facts found by the Court of Appeal, upon which its judgment is based, and largely ignore that court's conclusions as to the legal consequences of the facts which it found.

First, Respondents insist (Resp. brief, pp. 2, 3) that the suit "... involved a classic action for damages and reparations for the breach of a private gas sales contract and 'arises under' well established rules and principles of state contract law," and that "[c]ontrary to Arkla's totally erroneous and misplaced contentions that actions for damages for the breach and violation of private gas sales contracts 'arise under' federal law ..." (Resp. brief, p. 15).

The facts are that Respondents' "damages" which they are claiming are solely and simply the additional gas price they claim under their interpretation of the contract which has been on file since 1954 as Respondents' FPC Gas Rate Schedule for gas sold in interstate commerce for resale. While both the trial court (App. pp. 35a, 36a)[1] and the Court of Appeal (App. p. 13a) held that Respondents' rights under the contract were dependent upon the Natural Gas Act, the courts undertook, over petitioner's objections, to interpret the FPC Rate Schedule and to apply parochial ideas of law and policy to its interpretation.

Second, Respondents in their brief (pp. 7, 8) consistently describe the payment of lease royalty by Petitioner to the United States, its lessor, as the payment of "agreed upon prices per MCF for the Government's royalty gas"—and they even go so far as to characterize this statement as "determined by the courts below." This word-juggling disregards and contradicts the specific determination by the Court of Appeal (App. 9a) that the payment to the United States was the payment of *rent,* not the price of a sale. Petitioner's

[1] We cite the appendix to the petition for certiorari as "App. p. —" and Respondents' appendix as "Resp. App. p. —."

position is that the Court of Appeal in interpreting Respondents' Rate Schedule failed to apply properly the federal rule of law embodied in *Mobil Oil Corp.* v. *F.P.C.,* 463 F.2d 256 (D.C. Cir. 1971), cert. den. 406 U.S. 976 (1972), which is determinative of the issue of triggering.[2]

Third, Respondents repeatedly in their brief (for example, pp. 2, 3) charge Petitioner with fraudulent concealment for fourteen years of its continuous breach of the contract. This is in spite of the fact that the trial court rejected[3] their contention of concealment by ignoring it; and the further fact that the Court of Appeal held (App. p. 14a):

> "The trial court did not make a finding of fraudulent concealment, and we find the evidence is insufficient to support such an allegation."

Respondents in their brief and appendix have quoted, out of context, parts or the whole of letters and documents for the apparent purpose of creating an

[2] Cf. *Textile Workers Union of America* v. *Lincoln Mills,* 353 U.S. 448 (1957). See also, *Local 174* v. *Lucas Flour Co.,* 369 U.S. 95 (1962) where this Court held that federal law governs as to the interpretation of collective bargaining agreements under the Labor Managment Relations Act, 61 Stat. 156, 29 U.S.C. § 185. The Court in so holding expressed a need for uniformity equally applicable to Natural gas rate schedules, 369 U.S. at 103:

> "[T]he subject matter ... is peculiarly one that calls for uniform law .... *The possibility that individual contract terms might have different meanings under state and federal law would inevitably exert a disruptive influence upon both the negotiation and administration of collective agreements.*" [Emphasis added.]

[3] A contention not passed on is rejected; *Villars* v. *Faivre,* 36 La. Ann. 398 (1884); *Soniat* v. *Whitmer,* 141 La. 235, 74 So. 916 (1917).

impression of wrongdoing or deviousness on the part of Petitioner, which had been advised by its lawyer that "purchase from another party seller" did not include royalty payments. We submit that it is not the practice of this Court on petitions for certiorari to review the evidence; and specific fact findings of the court below should not be disregarded on the basis of references in brief to selected bits and pieces of the evidence.[4]

The same objection is made to the selective quotations in Respondents' brief of excerpts from orders of the Federal Power Commission in the proceeding for declaratory relief begun by Petitioner (Resp. brief, pp. 22-26). The parts of the orders not quoted, in several instances, contain findings and orders that would preclude much of the relief sought in this suit by Respondents. But in that proceeding (now pending in the Federal Energy Regulatory Commission), the issues of status and jurisdiction are all at large, undecided. Petitioner sought review of the orders of the Commission in the United States Court of Appeals for the District of Columbia Circuit (Case No. 77-1146, *Arkansas Louisiana Gas Co.* v. *Federal Power Commission*). During the pendency of the review proceedings, the newly appointed Federal Energy Regulatory Commission sought, and the Court of Appeals granted, remand of the case to the Commission for further consideration; and there the proceeding stands, undecided.

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[4] Respondents' suggestion that Petitioner's reconventional demand, ignored by the courts, in some way consented to the courts' jurisdiction (Resp. brief, p. 10) is in conflict with the Louisiana rules, Code of Civil Procedure, Article 3, that "[t]he jurisdiction of a court over the subject matter of an action . . . cannot be conferred by consent of the parties."

B. THE AUTHORITIES RELIED ON BY RESPONDENTS ARE NOT APPLICABLE TO AN FPC RATE SCHEDULE WHICH IS GOVERNED BY FEDERAL REGULATORY LAW AND IS SUBJECT TO THE COMMISSION'S PRIMARY AND EXCLUSIVE RATE JURISDICTION.

As we have explained, the Respondents have constructed in their brief a case different from the case found and decided by the Court of Appeal. Respondents defend the judgment they have obtained as being for breach of implied obligations in their contract of fair and honest dealing. The fact is that the judgment was based by the Court of Appeal upon an interpretation of Respondents' Rate Schedule which the court was without power to make and not upon any claim of concealment.

In these circumstances, the authorities cited by Respondents as to the competence of the courts to pass on the issues of this suit are beside the point of the case as found by the Court of Appeal. Those authorities deal with features of gas contracts which are not controlled by the *Natural Gas Act,* and do not involve the fixing of, or changes in, the prices of gas sold in interstate commerce for resale, which are governed by specific provisions of Section 4 of the *Natural Gas Act,* and regulations thereunder of the Commission. This case, as passed on by the Louisiana Court of Appeal, required it to interpret Respondents' FPC Rate Schedule, and to determine changes in price, not only for the future, but for the past. Not one of the cases cited in Respondents' brief involved such a problem, as appears from the following review.

(1) *Skelly Oil Co.* v. *Phillips Petroleum Co.,* 339 U.S. 667 (1950), involved a sales contract between a gas producer and a reseller for the sale of gas. The

suit was decided four years before this Court's decision in the *Phillips* case,[5] in which it was first held that the sales of producers, in interstate commerce, were subject to the provisions of the *Natural Gas Act*. At the time the case was decided the contract was indeed subject solely to state contract law.[6] *Merle M. Rowan,* 39 FPC 64 (1968), cited by Respondents as to the Commission's policy, was also decided on the basis of a contract escalation which occurred before the *Phillips* case.

(2) *Pan American Petroleum Corp.* v. *Superior Court of Delaware,* 366 U.S. 656 (1961), was brought by a pipeline company to recover overpayments under a gas sales contract of rates in excess of the producer's filed rate.[7] The case did not concern the interpretation of a FPC rate schedule. Plaintiff's allegations were that the payments were made under duress and in

[5] *Phillips Petroleum Co.* v. *Wisconsin*, 347 U.S. 672 (1954).

[6] For this reason, *Skelly* did not involve any question as to the Commission's rate jurisdiction or the interpretation of a jurisdictional rate schedule. Since the contracts were viewed as being non-jurisdictional they were not thought to be within the Commission's control and were not filed with the Commission.

[7] There is a major difference between a suit to recover overcharges or collections in excess of the rate on file with the Commission and Respondents' state court action in seeking an increase in rate levels. The difference is explained in *Socony-Mobil Oil Co.* v. *Brooklyn Union Gas Co.*, 299 F.2d 692 (5th Cir. 1962), *cert. den.* 371 U.S. 887 (1962). In that case, the facts were similar to those in *Pan American* in that *Mobil* had collected rates which were in excess of the rate on file with the Commission. The Fifth Circuit found that it had jurisdiction to award the refund of moneys collected in excess of the rate on file with the Commission but that it did not have jurisdiction to authorize a rate increase, that authority being vested exclusively in the Commission. See 299 F.2d at 694-695.

error; and this Court held that the claims obviously did not arise under the *Natural Gas Act* but were claims of right arising under state law, not federal law even though it could be anticipated that defendant would attempt to defend under the *Natural Gas Act.*[8]

(3) *United Gas Pipe Line Co.* v. *Mobile Gas Corp.,* 350 U.S. 332 (1956), affirmed what is now the commonplace that the *Natural Gas Act* provides for *initial rates* and *contract provisions* to be set by contract, but illustrates also that after having been initially set by the parties by their contract no changes can be made except in accordance with Section 4 of the *Natural Gas Act. Phillips Petroleum Co.* v. *F.P.C.,* 349 F.2d 535 (10th Cir. 1965), involved the same principles as to the initial setting of contract rates and the manner in which they could be changed.

(4) Respondents cite *F.P.C.* v. *Hope Natural Gas Co.,* 320 U.S. 591 (1944), for the well settled rule that the Federal Power Commission "has no power to make reparation orders." Respondents apparently draw from this the unwarranted but erroneous conclusion that courts do have such powers; see, to the contrary, *Montana-Dakota Utilities Co.* v. *Northwestern Public Service Co.,* 341 U.S. 246 (1951). In *F.P.C.* v. *Sunray DX Oil Co.,* 391 U.S. 9 (1968), this Court repeated its statement that the Commission has no reparation powers; this was decided in an opinion in which the Court said that the "in-line price" once set could not be changed by the Commission except in accordance

[8] See, *Lewis* v. *Transcontinental Gas Pipe Line Corp.*, 200 F. Supp. 219, 220 (S.D. Tex. 1961) holding that the "well-pleaded complaint rule" referred to in *Pan American* does not apply to the determination of agency versus court jurisdiction.

with the provisions of Sections 4 and 5 of the *Natural Gas Act*.

(5) In *Louisiana* v. *FPC.*, 503 F.2d 844 (5th Cir. 1974), the court affirmed the authority of the Commission to issue curtailment orders which would affect consumer contracts not otherwise subject to regulation by the Commission. The consumer would be entitled to bring a suit for breach of contract, even though the gas companies might have a federal defense.

(6) *Skelly Oil Co.* v. *F.P.C.*, 532 F.2d 177 (10th Cir. 1976), involved the contract basis for Skelly's rate change filing. The Commission held that the contract did not support the higher rate and the court held, construing the contract on review of the Commission's order, that it did. The case is authority that a rate change filing is required for a contract change.

(7) *City of New Orleans* v. *United Gas Pipe Line Co.*, 390 F.Supp. 861 (D.C. E.D. La. 1974), is a decision by Judge Rubin (now of the Fifth Circuit Court of Appeals) under the "well-pleaded complaint" rule that in order to be within the removal jurisdiction of the federal court, the plaintiff's pleading itself must show a federal question. Anticipation of a federal defense is not enough to support federal jurisdiction. In that case the contract involved was a consumer contract not subject to the Commission's rate jurisdiction. Judge Rubin's decision on the removal of the instant case, referred to in Respondents' brief, is another example of the application of the "well-pleaded complaint" rule.

(8) *Gulf Oil Corp.* v. *American Louisiana Pipeline Co.*, 282 F.2d 401 (6th Cir. 1960), and *Western Natural Gas Co.* v. *Cities Service Gas Co.*, 507 Pac.2d

1236 (Okla. 1972), appeal dismissed and cert. den. 409 U.S. 1052 (1972), both involved actions for damages arising from breaches of one party's obligations to deal honestly and fairly with the other and did not involve matters controlled by the *Natural Gas Act*. The cases did not involve a violation of a certificate issued by the Commission, the interpretation of a rate schedule or the determination of the price of gas sold in interstate commerce for resale. In the *Gulf* case, Gulf was obligated by contract to file and diligently to prosecute an application with the Commission for a Certificate of Public Convenience and Necessity; Gulf had signed the sales contract with plaintiff without insisting upon, although it asked for, a provision that the initial sales price of the gas should be found by the Commission to be "just, fair and reasonable." In its application for a certificate Gulf inordinately delayed the Commission's decision by insisting on the very provision that it had waived its contract right to require. This conduct on Gulf's part much delayed and finally frustrated the contract and the holding of the court was that Gulf had breached the contract by its failure to deal fairly and honestly with the buyer.

The *Cities Service* case was essentially the same as the decision in *Gulf*. Cities Service had a contract with Western for purchase of gas which expired at the end of the ten-year term, although under the provisions of the *Natural Gas Act* the delivery of gas could not be terminated without an order of the Commission granting the seller the right to abandon delivery. Cities Service Gas Co. intervened in Western's abandonment proceeding, as the court held that it had the right to do, but Western claimed, and the jury in the state court found, that Cities Service acted in bad faith and

had misrepresented the facts to the Commission with the result that Western's abandonment proceeding was unsuccessful. Western was granted judgment for damages for the additional money it could have received for a sale of its gas to someone other than Cities. The case stands solely for the proposition that a breach of duty by the buyer as to a matter not controlled by the *Natural Gas Act* (as rates are) may be remedied by a damage action.[9]

(9) *Eastern Petroleum Co.* v. *Kerr-McGee Corp.*, 447 F.2d 569 (7th Cir. 1971), and *Louisiana Nevada Transit Co.* v. *Woods,* 393 F.Supp. 177 (W.D. Ark. 1975), cited by Respondents, both involved "favored nation" provisions in intrastate gas sales, and neither has any relevance to the principles on which Petitioner's application for certiorari is based.

[9] It was for this reason that in *Cities Service Gas Co.* v. *F.P.C.*, 535 F.2d 1278, 1288-89 (D.C. Cir. 1976) the D.C. Circuit determined that the damages awarded could not be used as a set-off against the obligation to pay the Commission prescribed rate.

C. CONCLUSION

In the *Natural Gas Act* Congress conferred upon the *Commission* exclusive jurisdiction to determine the prices at which natural gas is sold for resale in interstate commerce. If the courts of each of the states were to have the power to interpret, in the light of local ideas of policy, the rate schedules which control the prices for such sales, the uniformity necessary to the *Commission's* administration of the *Natural Gas Act* would be undermined.

Respectfully submitted,

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No. 78-986

In the Supreme Court of the United States

OCTOBER TERM, 1978

ARKANSAS LOUISIANA GAS CO., PETITIONER

v.

FRANK J. HALL, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEAL, SECOND CIRCUIT STATE OF LOUISIANA

BRIEF FOR THE UNITED STATES AND THE FEDERAL ENERGY REGULATORY COMMISSION AS AMICI CURIAE

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ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEAL, SECOND CIRCUIT STATE OF LOUISIANA

BRIEF FOR THE UNITED STATES AND THE FEDERAL ENERGY REGULATORY COMMISSION AS AMICI CURIAE

This brief is filed in response to the Court's invitation of February 21, 1979, on behalf of the United States and the Federal Energy Regulatory Commission.[1]

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[1] Under Section 402(a)(1)(C),(D),(E), and (F) of the Department of Energy Organization Act, Pub. L. No. 95-91, 91 Stat. 583, to be codified at 42 U.S.C. 7172(a)(1)(C),(D),(E), and (F), this agency has succeeded to the relevant func-

QUESTION PRESENTED

Whether, in an action for breach of a gas purchase contract subject to the Natural Gas Act, the state courts should have referred the interpretation of the disputed contract provision to the Federal Energy Regulatory Commission under the primary jurisdiction doctrine.

STATUTE AND REGULATIONS INVOLVED

Section 4 of the Natural Gas Act, 15 U.S.C. 717c and regulations thereunder, 18 C.F.R. 154.92-154.95, 157.40 are set forth at Pet. App. 52a-60a.

STATEMENT

Proceedings in the Louisiana Courts

In 1952, petitioner Arkansas Louisiana Gas Company ("Arkla"), an interstate natural gas pipeline company, agreed to purchase natural gas from respondents, a group of producers operating properties in the Sligo Gas Field in Louisiana (Pet. 5; Pet. App. 24a). The 28-year agreement set forth a schedule of prices, including increases in specific amounts to be effective every five years up to an agreed maximum.

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tions and responsibilities of the former Federal Power Commission with respect to the certification and regulation of sales of natural gas in interstate commerce under the Natural Gas Act, 15 U.S.C. 717-717w. The term "Commission" herein refers to the Federal Power Commission or the Federal Energy Regulatory Commission as the context indicates.

(Pet. 5). It also contained a further price escalation provision, described as a "favored nations clause", providing in pertinent part (*id.* at 24a-25a):

> If at any time during the term of this agreement Buyer should purchase from another party seller gas produced from the subject wells or any other well or wells located in the Sligo Gas Field at a higher price than is provided to be paid for gas delivered under this agreement, then in such event the price to be paid for gas thereafter delivered hereunder shall be increased by an amount equal to the difference between the price provisions hereof and the concurrently effective higher price provisions of such subsequent contract; * * *

After this Court's 1954 decision in *Phillips Petroleum Co.* v. *Wisconsin*, 347 U.S. 672 ~~(1954)~~, holding that producer sales of natural gas in interstate commerce are subject to the jurisdiction of the Federal Power Commission under the Natural Gas Act, 15 U.S.C. 717, respondents obtained a certificate of public convenience and necessity permitting the sales under Section 7(c) of the Natural Gas Act, 15 U.S.C. 717f(c) (Pet. 5). They also filed their contract with the Commission as their FPC Gas Rate Schedule No. 4 under Section 4(c) of the Act, 15 U.S.C. 717c(c) (*ibid.*).

In 1961 Arkla acquired an oil and gas lease from the United States covering certain federal lands in the Sligo Field and agreed in the lease to pay specified royalties to the United States on gas produced from the leasehold (Pet. App. 4a). In 1974, respondents

sued Arkla for breach of contract in a Louisiana state court,[2] alleging that the lease payments that Arkla had made to the United States constituted "purchase[s] [of gas] from another party seller" and thus had triggered increases under the favored nations clause (Pet. App. 5a, 28a). They sought damages measured by the difference between the payments they had received from Arkla under the contract price schedule, and the prices allegedly paid to the United States. (*ibid.*).

Arkla contended that its payments to the United States were royalties under a lease, not consideration for the purchase of gas, and did not trigger the favored nations clause (Pet. App. 9a, 33a).

Arkla unsuccessfully moved the Louisiana district court to dismiss the action on the ground that exclusive or primary jurisdiction over the issues was vested in the Commission under the Natural Gas Act (Pet. App. 46a).[3] Following a lengthy trial, the Louisiana district court held, in light of the intentions of the parties at the time when the contract was made, that the favored nations clause had been triggered by the lease payments to the United States, whether characterized as royalties or payments for purchased gas (Pet. App. 24a-38a, 39a-43a).

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[2] *Frank J. Hall, et al.* v. *Arkansas Louisiana Gas Company*, First Judicial District Court, Caddo Parish, Louisiana, No. 225,699 (July 30, 1975). (Pet. App. 46a).

[3] Arkla also sought to remove the case to a federal district court, but the federal court denied its motion.

With respect to damages, however, the court held that under the Natural Gas Act and the "filed rate" doctrine, plaintiffs could recover increases under the favored nations clause only to the extent that those increases had been filed with, or otherwise authorized by the Commission (*id.* at 35a-36a, 42a). Because respondents had not filed increased rates implementing the favored nations increases, the court held that they could not recover damages for periods prior to October 1972 (Pet. App. 35a, 42a).

In October 1972, respondents had acquired the status of "small producers" under Commission orders and regulations,[4] which permitted them thereafter to collect increased rates allowed by their contracts up to the ceilings established in applicable Commission area rate orders without making additional filings. Because the prices paid to the United States were below the maximum area rates applicable after the plaintiffs became small producers, the court concluded that they were entitled to damages from October 1972 through December 1975 (Pet. App. 35a-38a).[5]

2. The Louisiana court of appeal affirmed (Pet. App. 2a-20a). It held that the Commission did not have either exclusive or primary jurisdiction over the issues in the case. It reasoned that the Natural Gas Act does not abrogate private rate contracts, that the claims for breach arose under state contract law,

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[4] See 18 C.F.R. 157.40.

[5] One party, W. E. Hall, Jr., was denied any damages because he had by an amendment to his contract in 1969 deleted the most favored nations clause (Pet. App. 35a).

and that the issues presented—the construction of a contract and the intentions of the parties at the time it was made—did not require the specific technical expertise of the Commission (Pet. App. 7a-8a).

The court of appeal agreed with the trial court's conclusion that the favored nations clause had been triggered by the lease payments to the United States (Pet. App. 8a-11a). It also agreed with the trial court that, by reason of the operation of the Natural Gas Act, plaintiffs were entitled to damages only for the period after October 1972, when they obtained small producer status (Pet. App. 13a-14a). The appellate court also rejected plaintiffs' claims that Arkla was guilty of fraudulent concealment of information about its payments to the United States (Pet. App. 15a). It held, however, that the trial judge's calculations of damages between October 1, 1972 and December 31, 1975 erroneously embraced the entire period of the breach (September 1961 through December 31, 1975), and the court therefore remanded the case for trial on the issue of damages only (Pet. App. 18a-20a).

3. The Supreme Court of Louisiana denied Arkla's application for a writ to review the court of appeal's decision (Pet. App. 22a), and this petition seeks review of the court of appeal's decision.

When the Supreme Court of Louisiana denied Arkla's petition for review, it granted respondent's request that it determine whether damages should have been awarded for the period prior to October

1972 (Pet. App. 23a).[6] In a decision entered after the instant petition was filed, the State Supreme Court amended the judgment of the court of appeal to allow plaintiffs damages for the entire period between September 1961 through December 31, 1975 (Supp. Pet. App. 66a-81a). It held that "[a]lthough defendant was only bound to pay plaintiffs a higher price if plaintiffs filed a new rate schedule with the Commission, it is apparent that defendant prevented the fulfillment of that condition (plaintiffs' filing with the Commission) by failing to inform plaintiffs of its contractual arrangements with the United States government" (Supp. Pet. App. 75a). It further concluded that if plaintiffs had been able to file for an increase, the Commission would have allowed it (*id.* at 77a).

Proceedings Before The Commission

While proceedings were under way in the state district court, Arkla filed with the Commission a petition for a declaratory order that the favored nations clause in its contract with respondents was not triggered by its lease payments to the United States. The Commission declined jurisdiction. It held that it had concurrent jurisdiction with the state court over the question, but that it would follow a policy of deferring "action on contract questions presented to it involving jurisdictional sales which are pending in

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[6] W. E. Hall's recovery, however, was cut off as of the date he agreed to deletion of the favored nations clause (Supp. Pet. App. 81a). See note 5, *supra*.

court."[7] The Commission expressed the view that respondents would not be entitled to any rate under the Natural Gas Act exceeding those specified in their rate schdule on file and in effect under the rate schedule—*i.e.*, rates set forth in their original 1952 contract. The Commission also found that respondents had acquired small producer status effective October 19, 1972, and therefore were not required, under the Commission's small producer regulation, 18 C.F.R. 157.40(e), to file increases with the Commission so long as they recovered no more than the applicable ceiling rates established by the Commission.[8]

Arkla petitioned the United States Court of Appeals for the District of Columbia Circuit for review of the Commission's orders.[9] On May 25, 1978, the court of appeals granted the Commission's motion for remand of the record to the Commission for reconsideration. Following further proceedings directed to whether the Commission has primary jurisdiction and whether it should be exercised in the circumstances of this case, the Commission entered an order on May 18, 1979, declining jurisdiction (App., *infra*, 1a-15a).

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[7] *Arkansas Louisiana Gas Company* v. *Frank J. Hall*, FPC Docket No. RI76-28, "Order Denying Petition," March 8, 1976. The Commission issued five additional orders in this Docket: "Order Granting Rehearing for Purposes of Further Reconsideration," May 6, 1976; "Order Denying Application for Rehearing," June 4, 1976; "Order Granting Rehearing for Purposes of Further Consideration," July 30, 1976; "Order Denying Application for Rehearing," January 7, 1977.

[8] Order of November 8, 1976.

[9] *Arkansas Louisiana Gas Co.* v. *Federal Power Commission*, D.C. Cir. No. 77-1146. (May 25, 1978).

The Commission rejected the policy of its predecessor, the Federal Power Commission, of automatically deferring contract questions involving jurisdictional sales of natural gas to state courts in which those questions are pending. Instead, it concluded that it should examine the particular question in the light of three factors: "(1) whether the Commission possesses some special expertise which makes the case peculiarly appropriate for a Commission decision; (2) whether there is a need for uniformity of interpretation of the type of question raised by the dispute; and (3) whether the case is important in relation to the regulatory responsibilities of the Commission" (App., *infra*, 7a).

Applying those factors, the Commission declined to assert primary jurisdiction. It concluded that in the circumstances of this case, interpretation of the favored nations clause presented no issue requiring exercise of the Commission's special expertise. The outcome turns, rather, on interpretation of the parties' intentions (App., *infra*, 8a-9a). The Commission also noted that the contract had been made long before the Commission's 1961 regulations (18 C.F.R. 154.93) addressing (and prospectively prohibiting) favored nations clauses of this kind. Because there had been no Commission policy concerning such clauses before 1961 (their meaning therefore having been left to the intentions of the contracting parties), the Commission concluded that there was no particular need for a uniform ruling as to the kind of "purchase" that may trigger an automatic price increase under a favored nations clause (App., *infra*, 9a-11a).

Finally, the Commission concluded that the issue would not have a significant impact on its regulatory responsibilities, since respondents made no claim to increases in excess of applicable area ceiling rates (App., *infra*, 12a-13a). The Commission also expressed the view, however, that insofar as the Louisiana Supreme Court attempted to award damages for the period prior to the Hall group's acquisition of small producer status in October 1972, the judgment violated the filed rate doctrine as set forth in *Montana-Dakota Utilities Co.* v. *Northwestern Public Service Co.*, 341 U.S. 246, 251-252 (App., *infra*, 12a-15a, n.18).[10]

DISCUSSION

The petition in this case is addressed only to the decision of the state court of appeal. That judgment has subsequently been amended, with respect to the period for which damages may be awarded, by the Supreme Court of Louisiana. Arkla filed a petition to review that decision on May 29, 1979 (No. 78-1789). As to the instant case, however, the court of appeal correctly declined to refer the interpretation of the favored nations clause to the Commission under the primary jurisdiction doctrine, and there is no reason for further review of the issue by this Court. Insofar as the Supreme Court of Louisiana held that respond-

[10] The Commission's order of May 18, 1979 is subject to rehearing and judicial review under Sections 19(a) and (b) of the Natural Gas Act, 15 U.S.C. 717r(a) and (b).

ents are entitled to damages in excess of rates on file with the Commission prior to the time that the group achieved small producer status, we believe that the decision is inconsistent with supervening federal law —the filed rate doctrine as set forth in *Montana-Dakota Utilities Co.* v. *Northwestern Public Service Co.*, 341 U.S. 246, 251 (1951).

1. The court of appeal correctly held that the contract interpretation question presented was a matter within the concurrent jurisdiction of the state courts and the Commission. The complaints sought recovery under the provisions of private contracts. "The rights as asserted by [respondents] are traditional common-law claims. They do not lose their character because it is common knowledge that there exists a scheme of federal regulation of interstate transmission of natural gas." *Pan American Petroleum Corp.* v. *Superior Court*, 366 U.S. 656, 663 (1961). Moreover, unlike regulatory schemes that require uniform rates to all customers, the Natural Gas Act "expressly recognizes that rates to particular customers may be set by individual contracts," *United Gas Co.* v. *Mobile Gas Corp.*, 350 U.S. 332, 338 (1956). As the Commission observed in its order of May 18, 1979 (App., *infra*, 9a), its "role with respect to such contracts should intrude no further into doctrines of state contract law than necessary to carry out the responsibilities under the Natural Gas Act." See also *United Gas Co.* v. *Memphis Gas Division*, 358 U.S. 103, 109-110, 112-114 (1958).

The Natural Gas Act may reinforce private contractual rights or abrogate them when they contravene relevant public interests. See *e.g.*, *Permian Basin Area Rate Cases*, 390 U.S. 747, 784 (1968). However, absent adverse effects on the interests protected by the regulatory scheme—for example, prices in excess of established ceilings—the parties should be left to the bargain they have made. This is an appropriate rule even though, under Section 4(c) of the Natural Gas Act, 15 U.S.C. 717c(c), every contract for the interstate sale of gas had to be filed with the Commission.[11] Otherwise, the Commission and the federal courts would be inundated by "a vast current of [contract] litigation indubitably arising under State law * * * *." *Skelly Oil Co.* v. *Phillips Co.*, 339 U.S. 667, 673 (1950). In *Skelly Oil*, for example, this Court held, in a federal diversity action involving the meaning of a term—"certificate of public convenience and necessity"—in a natural gas contract, that the intentions of the parties would be controlling even though the identical term appears in the Natural Gas Act. Moreover, the Court has not required automatic resort to the primary jurisdiction of the Commission in the interests of preserving a uniform scheme of regulation. See *Pan American Petroleum Corp.* v. *Superior Court*, *supra*, 366 U.S. at 666: "'[T]he attainment of uniformity does not require

[11] These requirements have been prospectively changed with respect to gas not previously committed or dedicated to interstate commerce by Section 601 of the Natural Gas Policy Act of 1978, Pub. L. No. 95-621, 92 Stat. 3350, 3409.

that in every case where the construction of a tariff is in dispute, there shall be a preliminary resort to the Commission.'" (quoting from *Great Northern Ry. Co.* v. *Merchants Elevator Co.*, 259 U.S. 285, 290-291 (1922)).

Thus, whether the Commission's primary jurisdiction should be invoked in any particular contract dispute involving the interstate sale of natural gas depends upon the public interest considerations that inform the primary jurisdiction doctrine, as applied to the particular case. These include the need for exercise by the Commission of its special expertise in the circumstances of the case; the need for uniformity of interpretation; and the impact of the issues on the regulatory responsibilities of the agency. See *e.g.*, *Nader* v. *Allegheny Airlines*, 426 U.S. 290, 303-304 (1976); *Ricci* v. *Chicago Mercantile Exchange*, 409 U.S. 289, 305-306 (1973); *Southwestern Sugar & Molasses Co.* v. *River Terminal Corp.*, 360 U.S. 411, 417-418 (1959); *United States* v. *Radio Corporation of America*, 358 U.S. 334, 346-348 (1959); *United States* v. *Western Pacific R. Co.*, 352 U.S. 59, 66-67 (1956).

In this particular case, as the Commission has held, these concerns are not implicated. The Commission exercises no special expertise in ascertaining the intentions of contracting parties except where technical issues are presented (App., *infra*, 8a-9a). The contract itself was made before the Commission adopted any policies or regulations concerning favored na-

tions clauses, which in fact were prohibited with respect to contracts entered into after April 3, 1961. 18 C.F.R. 154.93. Thus, as the Commission ruled, "* * * the makers had no guidance from the Commission in drafting the clauses. Since at the time no Commission policy existed requiring uniformity, the meaning of the clauses was left to the intention of the parties. Ascertainment of such intentions is a matter of case-by-case adjudication that does not invoke the considerations of uniformity or technical expertise that would, in other circumstances, support assertion of the Commission's primary jurisdiction" (App., *infra*, 11a). Nor does construction of the favored nations clause on the basis of the intentions of the contracting parties affect the Commission's regulatory responsibilities. Resolution of the dispute turns on evidence of dealings between the parties relevant only to this case.

Petitioner errs in contending that federal court decisions holding that the leasing of gas producing properties is not a jurisdictional sale subject to the Natural Gas Act are relevant to the meaning of the favored nations clause. See *Mobil Oil Corp.* v. *FPC*, 463 F.2d 256 (D.C.Civ. 1971), certiorari denied, 406 U.S. 976 (1972). The fact that such lease arrangements are not "sales" of gas within the Commission's jurisdiction under the Natural Gas Act does not preclude the conclusion that the parties intended them to constitute "purchase[s]" within the meaning of their own contract and as a matter of state law. Nor does it create an "imminent possibility of collision" between state court contract judgments and the Commission's authority to regulate the interstate transportation and sale of natural gas. *Northern Natural Gas Co.* v. *Kansas Corporation Commission*, 372 U.S. 84, 92 (1963). The respondents claimed no damages in excess of rate ceilings established by Commission orders. Thus, while the Commission undoubtedly has primary jurisdiction to consider the reasonableness of rates and practices in order to prevent disruption of the regulatory scheme and the unbalancing of existing rate structures (*United States* v. *Radio Corporation of America*, *supra*, 358 U.S. at 348), no such issues were presented.

2. Respondents sought only to recover from petitioner rates to which they were legally entitled under their contracts and the Natural Gas Act. Under the National Gas Act and well established federal law, jurisdictional sellers of gas are entitled only to rates set forth in their filed rate schedules or (to the extent they are excused from filing such schedules) under their contract pricing provisions, but in no event in excess of Commission established ceilings. Under the filed rate doctrine, they "can claim no rate as a legal right other than the filed rate, whether fixed or merely accepted by the Commission, and not even a court can authorize commerce in the commodity on other terms." *Montana-Dakota Utilities Co.* v. *Public Service Co.*, *supra*, 341 U.S. at 251. Because respondents had obtained small producer status in October 1972—which under Commission regulations relieved them of the obligation to file rate increases so long as they did not exceed applicable ceilings set by the Commission—they were not thereafter limited by the filed

rate doctrine. Prior to that time, however, they could claim no rate under the favored nations clause—which is an indefinite pricing provision that specifies no rate—except by filing with the Commission in accordance with Section 4(c) and (d) of the Natural Gas Act their proposed increase under the clause. The Louisiana Court of Appeal correctly recognized this (Pet. App. 13a-15a).[12] Since the measure of damages claimed turned on lease payments to the United States which did not exceed Commission applicable area ceilings (App., *infra*, 15a,), there was no question concerning the reasonableness of the rates for the Commission to consider.

In our view, the Supreme Court of Louisiana erred in holding that respondents must be deemed to have applied for the necessary rate increases between 1961 and 1972, and that the Commission would have allowed the increases. Even assuming, for the sake of argument, that Arkla's conduct prevented respondents from filing for the rate increases because they were not informed of the lease payments to the United States, this does not override the supervening requirements of the Natural Gas Act's rate filing provisions. See *e.g.*, *Northern Natural Gas Co.* v. *Kansas Corporation Commission, supra.* The *Montana-Dakota* case itself rested upon claims that

[12] See *e.g.*, *Interstate Natural Gas Co.* v. *Mississippi River Fuel Corporation*, 220 La. 43, 55 So.2d 775 (1951); *Ashland Oil & Refining Co.* v. *Federal Power Commission*, 421 F.2d 17 (6th Cir. 1970); *Socony Mobile Oil Co.* v. *Brooklyn Union Gas Co.*, 299 F.2d 692 (5th Cir. 1962).

filed rates claimed to be unreasonably low were a product of fraud. But this allegation did not avoid the filed rate doctrine. The Louisiana Supreme Court's erroneous decision, however, is not the subject of the present petition.[13]

CONCLUSION

For the reasons stated, the petition for a writ of certiorari to review the decision of the Court of Appeal, Second Circuit, State of Louisiana, should be denied.

Respectfully submitted,

WADE H. MCCREE, JR.
Solicitor General

ROBERT R. NORDHAUS
General Counsel

HOWARD E. SHAPIRO
Solicitor
Federal Energy Regulatory Commission

JUNE 1979

[13] As we have noted, page 10, *supra*, Arkla has recently filed a petition for a writ of certiorari to review that decision. While we believe that the decision of the court of appeal, of which the instant petition seeks review, is correct with respect to the issues of the Commission's primary jurisdiction and the filed rate doctrine—and therefore does not warrant this Court's review—the Court may consider it appropriate to defer consideration of the instant petition until it considers the most recently filed petition and the responses thereto. Moreover, while our position here is based on the Commission's decision of May 18, 1979, it should be noted that that decision is, under the Natural Gas Act, subject to reconsideration by the Commission, and to judicial review in the federal courts of appeals. See note 10, page 10, *supra*.

APPENDIX

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY
COMMISSION

Primary Jurisdiction

Before Commissioners: Charles B. Curtis, Chairman; Don S. Smith, Matthew Holden, Jr., and George R. Hall.

Docket No. RI76-28

ARKANSAS LOUISANA GAS COMPANY

v.

FRANK F. HALL, ET AL.

ORDER DECLINING JURISDICTION AFTER RECONSIDERATION OF THE ISSUE ON REMAND

(Issued May 18, 1979)

I

A QUESTION OF JURISDICTION

In this case this Commission [1] is faced with a question of jurisdiction. Should this Commission exercise jurisdiction to the exclusion of state courts to de-

[1] These proceedings were commenced before the FPC. By joint regulation of October 1, 1977 (10 CFR 1000.1), they were transferred to the FERC. The term "Commission," when used in the cotnext of action taken prior to October 1, 1977, refers to the FPC; when used otherwise, to the FERC.

termine whether a royalty agreement between a gas utility and the United States is a "purchase [of gas] from another party-seller" that triggers an automatic price increase under the "most favored nation clause" in a gas supply contract between the utility and certain independent producers of gas? [2]

II

HISTORY OF PROCEEDINGS

A. *The Parties*

Frank J. Hall *et al.* are a group of independent producers of natural gas. Under a 1952 contract with the Arkansas-Louisiana Gas Company ("Arkla"), if Arkla purchases gas from any other producer in the same gas field at a higher price for gas than it pays the Hall group under the contract, Arkla must pay the Hall group that higher price. This contractual provision, known as a most favored nation clause, provides:

> If at any time during the term of this agreement buyer should purchase from another party-seller gas produced from the subject wells or any other well or wells located in the Sligo gas field at a higher price than is provided to be paid for

[2] *Arkansas Louisiana Gas Company* v. *Frank J. Hall, et al.*, Docket No. RI76-28, Order Setting Matter for Determination on Brief, August 9, 1978. This is not the first time we are facing this case. The FPC first addressed the jurisdiction question in an order dated March 8, 1976. The FPC's previous actions in this case are discussed more fully in Section II, *infra*, pp. 4-5.

> gas delivered under this agreement, then in such event the price to be paid for gas thereafter delivered hereunder shall be increased by an amount equal to the differences between the price provisions hereof and the concurrently effective higher price provisions of such subsequent contract.

B. *The State Court Proceedings*

In 1974, the Hall group sued Arkla for breach of contract in a Louisiana State court [3] claiming that royalty payments made to the United States by Arkla since 1961 under a gas supply arrangement with the government had triggered the most favored nation clause. The Hall group claimed that they were entitled to damages retroactive to 1961.

In October 1977, the state court found for the Hall group and awarded substantial damages.

On appeal, the Court of Appeals of Louisiana, Second Circuit,[4] held that: (1) The trial court had proper subject matter jurisdiction. Jurisdiction was not exclusive in the FERC under the Natural Gas Act. And the FERC does not have primary jurisdiction to determine whether the favored nation clause was activated by the royalty payment to the Untied States. (2) The favored nation clause was activated by the royalty payment because the royalty payment was tantamount to a "purchase from another party

[3] *Hall* v. *Arkansas-Louisiana Gas Company*, 1st Judicial District Court, Caddo County, Louisiana, No. 225,699.

[4] *Hall* v. *Arkansas-Louisiana Gas Company*, 359 So.2d 255 (May 1, 1978).

seller." [5] The court remanded the case to the trial court for recalculation of damages. Arkla petitioned the Supreme Court of Louisiana for certiorari. The Supreme Court of Louisiana denied the petition.[6] Arkla has petitioned the Supreme Court of the United States for certiorari.

C. *Action Before the FPC*

After the Hall group first filed suit in state court, Arkla applied to the FPC for a declaratory order

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[5] The Court so found despite its recognition that the theory of ownership advanced by Arkla was:

> . . . in accord with the prevailing state law and federal decisions on this issue. See *Shell Petroleum Corp.* v. *Calcasieu Real Estate & O. Co.*, 185 La. 751, 170 So. 785 (1936); *Logan* v. *State Gravel Co.*, 158 La. 105, 103 So. 526 (1925); *Board of Com'rs. of Caddo Levee Dist.* v. *Pure Oil Co.*, 167 La. 801, 120 So. 373 (1929); *Melancon* v. *Texas Company*, 230 La. 593, 89 So.2d 135 (1956). *Mobil Oil Corporation* v. *Federal Power Commission*, 149 U.S.App.D.C. 310, 463 F.2d 256 (1971), *cert. den.* 406 U.S. 976, 92 S.Ct. 2413, 32 L.Ed.2d 676 (1972).

The Court concluded that the intentions of the parties were not to limit the activiation of the favored nation clause only to situations where there was a technical "purchase," "seller," or "price." The Court decided that royalty payments were within the intentions of the parties when they drafted the favored nation clause.

[6] A related petition for certiorari was also filed by the Hall group. The Hall group petition was granted for the limited purpose of considering the level of damages and whether one member of the group had waived his right to damages. The Louisiana Supreme Court on March 5, 1979, issued its decision on those matters. It has awarded damages for the period 1961 to 1972 which the Court of Appeals had rejected.

construing the favored nation clause contained in its contract with the Hall group.

Before the FPC, Arkla argued that the FPC had exclusive jurisdiction over the dispute. The FPC [7] held:

> There is nc question that sales of natural gas by [the Hall group] to Arkla are subject to the jurisdiction of the Commission.
>
> * * *
>
> However, there is a threshhold question as to the contractual basis of [the] rates. It has been Commission policy to defer action on contract questions presented to it involving jurisdictional sales which are pending in court * * *. This case presents a question of concurrent jurisdiction * * * While this Commission has jurisdiction to decide the subject contract question, the Louisiana court also has jurisdiction over an action based upon asserted breach of contract. Accordingly, we believe it appropriate to defer to the Court to decide these contract questions.

On Arkla's application for rehearing, the FPC ruled [8] that even if the state court held that the Hall group was entitled to a highe rate under the favored nation clause, they, as jurisdictional sellers, would still be limited to ceiling rates in effect under the

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[7] *ArkansasLouisiana Gas Company* v. *Frank J. Hall, et al.*, Docket No. RI76-28, Order Denying Petition (March 8, 1976).

[8] *Arkansas-Louisiana Gas Company* v. *Frank J. Hall, et al.*, Docket No. RI76-28, Order Denying Application for Rehearing (issued June 4, 1976). In these proceedings, the FPC issued other orders which are not relevant at this time.

Commission's regulations. The FPC also noted that since the producers held a small producer certificate effective October 19, 1972, they were not required to make any rate increase filings thereafter.

On February 3, 1977, Arkla petitioned the U.S. Court of Appeals for the District of Columbia Circuit for review of the FPC's orders.

D. *Actions By The FERC*

On March 21, 1978, the FERC moved in the U.S. Court of Appeals for an order remanding the record in these proceedings to the FERC for further consideration.

On May 25, 1978, the Court of Appeals granted the Commission's motion and remanded the record to the Commission.

On August 9, 1978,[9] the Commission asked for briefs directed towards the question of

> "whether this Commission has primary jurisdiction over these matters, and if so, whether this Commission should exercise such jurisdiction in the circumstances presented here."

The Commission noted that the briefs should not discuss the merits of the case but should limit the discussion to the jurisdictional issues.

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[9] *Arkansas-Louisiana Gas Company* v. *Frank J. Hall, et al.*, Docket No. RI76-28, Order Setting Matter for Determination on Brief.

IV.

DISCUSSION

As noted above, the FPC declined to issue a declaratory order construing the most favored nation clause in the Arkla-Hall contract. It held that there was concurrent jurisdiction with the state court and that it would defer to that court.

The FPC stated that there is a "[c]ommission policy to defer action on contract questions presented to it involving jurisdictional sales which are pending in state court." [10]

While we concur in the result reached by the FPC, we do not subscribe to its rationale. Whether the Commission should assert jurisdiction over contractual issues otherwise litigable in state courts, depends, we think, on three factors. Those factors are: (1) whether the Commission possesses some special expertise which makes the case peculiarly appropriate for Commission decision; (2) whether there is a need for uniformity of interpretation of the type of question raised by the dispute; and, (3) whether the case is important in relation to the regulatory responsibilities of the Commission. We believe the FPC's automatic policy of deferral of contract questions pending in state courts to the state courts was erroneous.

In examining whether this Commission has a special expertise which makes it the appropriate forum

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[10] Order Denying Petition (March 8, 1976) p. 3.

to decide whether the Arkla-Hall favored nation clause has been triggered, we note initially that the Commission is, in general, no more expert than a court in deciding non-technical contact questions. However, interpretation of some types of contractual clauses may involve examination of technical issues which are within this Commission's special expertise. Determination of the dispute between Arkla and the Hall group depends upon finding that Arkla has "purchase[d] from another party-seller gas produced from the subject wells or any other wells located in the Silgo gas field at a higher price than is provided to be paid for gas delivered under this agreement." While there are circumstances where the intrepretation of a favored nation clause may involve this Commission's technical expertise,[11] we have been presented with no issue in this case involving our special expertise. Arkla makes no argument in this case that would involve our technical expertise. Arkla's defense to the contract action is that the royalty agreement between itself and the United States is not a "purchase from anothe r party-seller" which triggered the favored nation clause. The outcome of the case appears to turn on interpretation of the intent of the parties to the contract rather than any determination

[11] See *Pure Oil Company* v. *F.P.C.*, 299 F.2d 370 (7th Cir., 1962). In that case the interpretation of a favored nation clause involved the issue of whether certain purchased gas possessed exceptional qualities for peaking purposes which enhanced its value to the extent that a seemingly triggering price was not higher on a comparative basis than the prices paid under the contract.

requiring special technical expertise. We therefore see no reason to exercise our jurisdiction based upon a finding that the case involves a matter within our special expertise.

We next consider whether this case is one in which there is an issue which requires uniform interpretation. We consider the need ofr uniformity in light of the policies Congress has charged this Commission to administer. In this regard we must consider that transactions subject to the Natural Gas Act rest in large part on private contracts and that the Commission's role with respect to such contracts should intrude no further into doctrines of state contract law than necessary to carry out the responsibilities under the Natural Gas Act.[12] While this "Commission has plenary authority to limit or proscribe contractual arrangements that contravene the relevant public interests," [13] and to thi send in appropriate cases, might find that achievement of the purposes of the Natural Gas Act requires that certain terms in contracts should be uniformly interpreted, we do not believe this to be such a case.

In this case this Commission is being asked to interpret a favored nation clause. The dispute is whether under the contract a royalty agreement is a "purchase [of gas] from another party-seller" that

[12] See *United Gas Co.* v. *Mobile Gas Corp.*, 350 U.S. 332, 343-344 (1956); *United Gas Co.* v. *Memphis Gas Div.*, 358 U.S. 103, 109-110, 112-114 (1958).

[13] *Permian Basis Area Rate Cases*, 390 U.S. 747, 784 (1968).

triggers an automatic pricei ncrease under the favored nation clause. In the circumstances of this case whether a "purchase" occurred within the meaning of the contract depends upon what type of transactions the parties to the contract intended "purchase" to include.[14] What "purchase from another party-seller" means in one gas supply contract does not necessarily mean the same thing in another gas supply contract. The makers of one contract may have intended the favored nation clause to be triggered by events other than those intended to trigger the clause in another contract. Since the meaning of a favored nation clause depends upon the intentions of the parties to the contract, we see no need for uniform interpretation of all faovred nation clauses. Indeed, uniform interpretation would seem to be impossible.

It has been argued that the interpretation of this contract may have involved a state court in determining whether a "sale" had occurred. And the interpretation of the word "sale", it was argued, would involve a state court in the interpretation of an important term defining this Commission's jurisdiction over gas.[15] But this case does not involve determining jurisdiction over gas. We undisputedly have jurisdiction over the gas involved in this case.

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[14] The Louisiana court properly looked to the intentions of the parties to the contract in determining the meaning of the contract. See n. 2, p. 3.

[15] This Commission's jurisdiction extends to "the *sale* of natural gas in interstate commerce fo rresale." Section 1(b) of the Natural Gas Act, 52 Stat. 821, 15 U.S.C. 717(b).

This case involves contract interpretation. And it is clear that the word "sale" may have a different meaning in a contract than it does under that section of the Natural Gas Act conferring jurisdiction upon this Commission. "The same words, in different settings, may not mean the same thing." [16]

Finally, in considering the need for uniformity, we look at the fact that the contracts between Arkla and the Hall group were entered into long before this Commission became actively concerned with the indefinite price escalator clauses and more particularly with favored nation clauses. The contract in question was entered into in 1952. Not until 1961 did the FPC issue regulations concerning most favored nation clauses.[17] Indeed, in contracts executed after April 3, 1961, most favored nation clauses are prohibited. Since these contracts were entered into before the FPC issued regulations concerning favored nation clauses, the makers had no guidance from the Commission in drafting the clauses. Since at the time, no Commission policy existed requiring uniformity, the meaning of the clauses was left to the intentions of the parties. Ascertainment of such intentions is a matter of case-by-case adjudication that does not invoke the considerations of uniformity or technical expertise that would, in other circumstances, support assertion of this Commission's primary jurisdiction.

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[16] *Skelly Oil Co.* v. *Phillips Petroleum Co.*, 339 U.S. 667, 678 (1950).

[17] 18 C.F.R. 154.93.

Finally, we must decide now what impact this case has on our regulatory responsibilities. This type of case, involving small producers not required by regulation under the Natural Gas Act to file for rate increases authorized by contract,[18] is not a matter of great import to our regulatory responsibility as we find no need for a uniform interpretation of a contractual provision, and find that the rates requested are within what the Commission has determined to be the zone of reasonableness.

On the facts of this case, the damages do not exceed applicable area ceiling rates.[19] The Louisiana

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[18] The Hall Group holds small producer certificates which exempt it from certain rate filing requirements. See 18 C.F.R. 157.40. But for this status, the group would have been required, under the filed rate doctrine, to apply for and receive approval of any change in its rates on file with this Commission before it could collect any price increase claimed to have been triggered under the favored-nation clause. *Montana Dakota Utilities Co.* v. *Northwestern Public Service Co.*, 341 U.S. 246, 251 (1951). Moreover, whether the group held small or large producer status, such increases could have been recovered only prospectively. *Id.* However, because a small producer is exempt from rate filing requirements and could commence collection of contractually authorized rates on demand to the buyer, a court would be capable of finding an award of damages for the difference between a rate permitted by the contract, *up to applicable limits provided by the Commission* for small producers, and amounts actually collected.

Prior to 1972 the Hall group did not hold small producer certificates. In the "Order Denying Application for Rehearing" issued June 4, 1976, the FPC stated on p. 2, n. 1:

> Prior to the filing of thier small producer application, respondents, of course, as ARKLA contends, would be entitled under the Natural Gas Act only to the rate on file with this Commission and in effect. See *Samedan Oil Corp., et al.*, 37 FPC 207, and cases cited therein.

The FPC held that the producers were not entitled to a rate increase for the period prior to when they held small producer certificates since they had not filed for a rate increase as required by Commission regulation. The Louisiana Supreme Court, however, has awarded damages back to 1961. It concluded that it was Arkla's fault that the Hall group has not filed for a rate increase prior to 1972. The Louisiana Court therefore deemed that the Hall group had fulfilled its obligation to file new rate schedules. On this basis the Louisiana Supreme Court awarded damages for the 1961 to 1972 period after the favored nation clause was found to have been triggered and before the Hall group received small producer certificates.

It is our opinion that the Louisiana Supreme Court's award of damages for the 1961-1972 period violates the filed rate doctrine. *Montana-Dakota Utilities Co.* v. *Northwestern Public Service Co.*, 341 U.S. 246, 251 (1951). This Commission, however, does not have the power to review what the state court has done. We note, however, that a petition for a writ of *certiorari* has been filed in the Supreme Court of the United States seeking review of the Louisiana Supreme Court's decision. *Arkla* v. *Hall*, Sup. Ct. No. 78-986, filed December 18, 1978.

[19] On April 25, 1979, we issued an "Order Requesting Additional Information to Supplement Record." Information received pursuant to that request confirms that damages do not exceed applicable area ceiling rates. Arkla contends that damages do exceed the applicable area ceiling rates. Arkla claims that the Louisiana courts erroneously awarded damages for liquefiable hydrocarbons. In this Commission's November 8, 1976, "Order Clarifying and Amplifying Commission Order Denying Rehearing" we stated:

> While the Commission has jurisdiction over natural gas containing liquefiable hydrocarbons, it has no jurisdiction over liquids after thier removal from the gas stream. Consequently, if a contract provides for severable pay-

Supreme Court concluded that the Hall group was entitled to damages measured by the difference between the price Arkla paid the United States under the royalty agreement and the price it paid the Hall group.[20] In so doing, it noted that it considered the fact that the Commission, in previous orders in this case, had stated the maximum rates to which the Hall group would have been entitled if contractually authorized and if proper filing procedures had been followed.[21] The Supreme court of Louisiana further stated:

> ments for the natural gas, including the liquefiable hydrocarbons contained therein, and the subsequently removed liquids, we would have jurisdiction over the sale of the natural gas containing the liquefiable hydrocarbons, but no jurisdiction over the sale of the liquids. But, there is a basic contract question presented with respect to the subject sale as to whether respondents are entitled under the sales contract to a price for the products removed by ARKLA from the natural gas purchased from respondents which is severable from the price for natural gas sold under such contract.

The Louisiana courts found that the contract provided for a price for the products removed from the gas severable from the price for the gas sold under the contract. The damages awarded for the actual natural gas, not including the severable payment for the products removed, was within the area ceiling rate.

[20] As we stated above, the Louisiana Supreme Court, in effect, waived one of this Commission's filing requirements when it determined that the Hall group was entitled to damages back to 1961. This holding of the Louisiana Supreme Court conflicts with the filed rate doctrine.

[21] *Frank J. Hall* v. *Arkansas Louisiana Gas Company*, Supreme Court of Louisiana (March 5, 1979), slip op. p. 11. The Commission's previous orders were its *Order Denying Application For Rehearing*, (June 4, 1976); and *Order Clarifying And Amplifying Commission Order Denying Application For Rehearing* (November 8, 1976).

> We note that plaintiffs make no claim that they would have been entitled to a price increase under their contract in excess of the respective area base rate ceilings for sales of natural gas as established by order of the Commission.[22]

In light of the fact that the Hall group makes no claim for damages higher than the applicable area ceiling rates, that the Louisiana Supreme Court did not authorize rates higher than the applicable area ceiling rates, and that the state district court on remand from the Louisiana Supreme Court will presumably not award damages higher than the area ceiling rates, we do not feel that our regulatory responsibilities are so affected that we must exercise our jurisdiction in this case.

Since we find that we need not exercise jurisdiction under any of the three applicable factors, we decline jurisdiction.

The Commission orders:

Upon review on remand, we decline to exercise jurisdiction on this matter for the reasons stated above.

By the Commission.

[SEAL]

Kenneth F. Plumb,
Secretary.

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[22] Supreme Court of Louisiana, slip op. p. 12, n. 7.

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Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-986

ARKANSAS LOUISIANA GAS COMPANY, *Petitioner,*

v.

FRANK J. HALL, MRS. W. E. HALL, SR., THE H. M. HARRELL TESTAMENTARY TRUST, JAMES E. HARRELL, JOHN K. HARRELL, SR., ASA BENTON ALLEN, SIDNEY G. MYERS, JR., W. O. COCHRAN, THOMAS F. PHILYAW, MRS. ELAINE ALLEN, JAMES A. NOE, D. B. MCCONNELL, MRS. EVA L. WEISS, SOL KAPLAN and NATIONAL AMERICAN BANK, New Orleans, Co-Testamentary Executors of the SUCCESSION of SEYMOUR WEISS, *Respondents.*

PETITIONER'S REPLY TO BRIEF FOR THE UNITED STATES AND THE FEDERAL ENERGY REGULATORY COMMISSION AS AMICI CURIAE

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-986

ARKANSAS LOUISIANA GAS COMPANY, *Petitioner*,

v.

FRANK J. HALL, MRS. W. E. HALL, SR., THE H. M. HARRELL TESTAMENTARY TRUST, JAMES E. HARRELL, JOHN K. HARRELL, SR., ASA BENTON ALLEN, SIDNEY G. MYERS, JR., W. O. COCHRAN, THOMAS F. PHILYAW, MRS. ELAINE ALLEN, JAMES A. NOE, D. B. MCCONNELL, MRS. EVA L. WEISS, SOL KAPLAN and NATIONAL AMERICAN BANK, New Orleans, Co-Testamentary Executors of the SUCCESSION of SEYMOUR WEISS, *Respondents*.

PETITIONER'S REPLY TO BRIEF FOR THE UNITED STATES AND THE FEDERAL ENERGY REGULATORY COMMISSION AS AMICI CURIAE

Petitioner, ARKANSAS LOUISIANA GAS COMPANY ("Arkla"), hereby replies to the Brief for the United States and the Federal Energy Regulatory Commission as Amici Curiae filed by the Solicitor General of the United States on June 2, 1979.

The Solicitor General and the Federal Energy Regulatory Commission ("Commission") phrase the question presented as:

> "Whether, in an action for breach of a gas purchase contract subject to the Natural Gas Act, the

state courts should have referred the interpretation of the disputed contract provision to the Federal Energy Regulatory Commission under the primary jurisdiction doctrine."

But all contractual disputes are not as germane to Commission jurisdiction as are those concerning price. Since all issues of this case pertain to *increased* prices payable under the gas purchase contract, the question presented is more precisely stated by the addition of the two words "price increase" as follows:

> "Whether, in an action for breach of a gas purchase contract subject to the Natural Gas Act, the state courts should have referred the interpretation of the disputed *price increase* contract provision to the Federal Energy Regulatory Commission under the primary jurisdiction doctrine."

The Solicitor General and the Commission recognize that the Commission has primary jurisdiction to consider the reasonableness of rates and practices to prevent disruption of the regulatory scheme and the unbalancing of existing rate structures. However, they argue that no such issues are presented in this case (Brief for the United States, p. 15). Further, they submit that, in the instant case, the Louisiana Court of Appeal correctly declined to refer the interpretation of the favored nation clause to the Commission under the primary jurisdiction doctrine and, thus, there is no reason for further review by this Court (Brief of the United States, p. 10).

In regard to primary jurisdiction, the Solicitor General and the Commission state that whether the Commission's primary jurisdiction should be invoked in any particular contract dispute involving the interstate sale of natural gas depends upon:

> "the public interest considerations that inform the primary jurisdiction doctrine, as applied to the particular case. These include the need for the exercise by the Commission of its special expertise in the circumstances of the case; the need for uniformity of interpretation; and the impact of the issues on the regulatory responsibilities of the agency." Brief for the United States, p. 13.

An analysis of these public interest considerations in light of the arguments of the Solicitor General and the Commission and the decisions of the Louisiana courts for which review is sought show that the Solicitor General and the Commission have misconstrued the doctrine of primary jurisdiction as it applies to the Commission's rate jurisdiction under the *Natural Gas Act,* 15 U.S.C. §§ 717, *et seq.* Furthermore, the question here is whether the state courts should have referred the questions presented in this case to the Commission. The Commission and the courts, in dealing with questions of the same nature as those involved in this case, have recognized the need for exercise of the Commission's special expertise; and have recognized the need for uniformity and the paramount nature of federal regulatory law.

Petitioner submits that the position of the Solicitor General and the Commission that this case does not present issues coming within the above quoted criteria they recognize for requiring reference to the Commission is contrary to prior policies and decisions by the Commission in administering and enforcing the *Natural Gas Act,* as well as decisions by the courts. Petitioner further submits that the position of the Solicitor General and the Commission is a withdrawal by the Commission from its regulatory responsibilities under the *Natural Gas Act* which it has heretofore recognized

and performed and from the standards for the interpretation of the *Natural Gas Act,* and of gas sales contracts and other questions arising under the *Natural Gas Act.* This Court has declared as follows:

> "Protection of consumers against exploitation at the hands of the natural gas companies was the primary purpose of the Natural Gas Act."

Phillips Petroleum Co. v. *Wisconsin,* 347 U.S. 672, 685 (1954); *United Gas Improvement Co.* v. *Continental Oil Co.,* 381 U.S. 392 (1965); *FPC* v. *Transcontinental Gas Pipe Line Corp.,* 365 U.S. 1 (1961); *Sunray Mid-Continent Oil Co.* v. *FPC,* 364 U.S. 137 (1960); *NAACP* v. *FPC,* 425 U.S. 662 (1976); *FPC* v. *Tennessee Gas Transmission Co.,* 371 U.S. 145 (1962); *FPC* v. *Louisiana Power & Light Co.,* 406 U.S. 621 (1972).

I.

THIS CASE REQUIRES THE EXERCISE OF THE COMMISSION'S SPECIAL EXPERTISE

A. Expertise as to Triggering of the Favored Nation Clause.

The principal issue in the lawsuit is whether the payment of market value royalties by Petitioner to the United States under a Government lease is a "purchase from another party seller" which would "trigger" the Section 8(D) favored nation clause of Respondents' Gas Rate Schedule. The Commission has considered this precise issue on many occasions and has developed its own special rules and regulations regarding the "triggering" of favored nation clauses. The Commission is uniquely aware of the principles that are involved in making that determination. In *Shell Oil Co.,* 29 F.P.C. 498, 499-500 (1963), the Commission stated what it considered to be the burden of proof on

a producer in order for the Commission to hold that a favored nation clause had been triggered by the purchaser paying another producer a higher rate:

> "[I]n order for the 'triggering' to occur, where (as here) the contract so provides, the producer filing the most-favored-nation rate increase must show that the other producer is the type of seller contemplated and produces in the area indicated in the contract, that the gas being purchased from the other producer is comparable gas, and that the rate being paid for it is 'higher' in fact as well as in appearance. By showing that these and any other conditions precedent (to triggering) exist, the producer filing for the escalated increase shows that his proposed increase has the 'contractual support' or consent of his purchaser; and the increased rate may be accepted for filing. *If he fails to show that these necessary conditions exist, his filing is rejected as a contractually unauthorized, unilateral rate increase.*" [Emphasis added.]

Respondents must have established to the Commission that they have contractual support for the activation of the favored nation clause before an increase in rate can become effective.

Additionally, however, the Commission further requires that producers must show that,

> "[a]fter establishing what rate is valid under the contract clause for the favored-nation increase, it must be shown that such rate is just and reasonable. In sum, *the validity of his filing is at all times subject to the ultimate determination of the validity of the triggering rate as well as the justness and reasonableness of the increased rate.*" 29 F.P.C. at 504. [Emphasis added.]

Thus, the Commission has established its own guidelines as to when a favored nation clause is triggered.

The issue of whether the payment of market value royalties under a Government lease is a "purchase" of gas that would constitute a basis for a change of rates for the sale of interstate natural gas should have been determined by the Commission in the first instance without resort to the state courts of Louisiana. See also, *West Texas Gathering Co.*, 29 F.P.C. 510 (1962), and *Morris Mizel, et al.*, 30 F.P.C. 1103 (1963). In the latter case, the Commission held based on a plain meaning rule of contract construction that a farmout agreement did not constitute a "purchase" sufficient to activate a favored nation clause:

> "In the absence of any provision in the Mizel-Trusts contract to the contrary, we must assume that the word 'purchase' is used as it is commonly employed in the industry, *i.e.*, in reference to the standard gas purchase contract." 30 F.P.C. at 1104.

Clearly, Commission expertise is required to insure proper application of established Commission rules and the decisions of appellate courts in review of Commission orders and opinions under the *Natural Gas Act*.

In this context, the Commission has regularly interpreted contracts on file with it as rate schedules. Indeed, under the *Mobile-Sierra-Memphis*[1] trilogy of cases, the Commission would always decide in the first instance whether a particular rate increase filing would be contractually authorized. In reviewing the Commission's decisions as to the "contract interpretation," the appellate courts have uniformly deferred to the Commission's expertise if its decision is amply supported both factually and legally. In *Gulf States Utilities Co.* v. *FPC*, 518 F.2d 450, 457 (D.C. Cir. 1975), it was stated:

> "Although the application of *Mobile-Sierra Memphis* principles to a given contract is primarily a matter of law, where the decision involves the interpretation of the parties' intent as revealed in the language of a contract, it is proper to defer to the Commission's expertise if its decision is 'amply supported both factually and legally.' *United Gas Pipe Line Co.* v. *Memphis Light, Gas & Water Division*, 358 U.S. [103 ,114 (1958).]"

Other cases embodying this same rule of law are numerous. See, *e.g.*, *Appalachian Power Co.* v. *FPC*, 529 F.2d 342, 351 (D.C. Cir. 1976), *cert. denied*, 429 U.S. 816 (1976)[2]; *Columbia Gas Transmission Corp.* v. *FPC*, 530 F.2d 1056, 1059 (D.C. Cir. 1976); *Indiana & Michigan Electric Co.* v. *FPC*, 530 F.2d 1060, 1062 (D.C. Cir. 1976); *New England Power Co.* v. *FERC*, 571 F.2d 1213 (D.C. Cir. 1977).

It has also been held that the Commission's primary jurisdiction under the *Natural Gas Act* is so extensive that it should be recognized even in the context of a non-jurisdictional rate setting where a Com-

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[1] *United Gas Pipe Line Co.* v. *Mobile Gas Service Corp.* ("*Mobile*"), 350 U.S. 332 (1956); *FPC* v. *Sierra Pacific Power Co.*, 350 U.S. 348 (1956) ("*Sierra*"); *United Gas Pipeline Co.* v. *Memphis Light, Gas & Water Division*, 358 U.S. 103 (1958). The trilogy has been held to apply equally to the *Natural Gas Act* and the *Federal Power Act*, 16 U.S.C. §§ 791, *et seq.*

[2] In *Appalachian Power Co.*, the Commission again relied upon the plain language of the agreements. The Commission declined to take the parties' conduct into account because "only contracts, as filed with the Commission, along with any properly filed and accepted amendments, can be regarded as embodying the presently effective contractual rates, terms and conditions." 529 F.2d at 350, n. 59.

mission filed tariff provision would require interpretation. In *Mississippi Power & Light Co.* v. *United Gas Pipe Line Co.*, 532 F.2d 412, 417 (5th Cir. 1976), it was stated with regard to the Commission's primary jurisdiction:

> "The doctrine of primary jurisdiction has evolved as a means of reconciling the functions of administrative agencies with the judicial functions of the courts. When legal disputes develop that directly affect an industry subject to regulation, the need arises to integrate the regulatory agency into the judicial decision making process. One method to accomplish integration is to have the agency pass in the first instance on those issues that are within its competence. In short, the agency should have the first word." [Footnote and citation omitted.]

The rate increase sought by Respondents for the sale of gas to Petitioner in interstate commerce should have been passed upon by the Commission "in the first instance." As concerns jurisdictional rate increases, the Commission "should [certainly] have the first word."

The fact that the Rate Schedule at issue was entered into prior to the adoption of Commission policies prohibiting contracts containing favored nation clauses does not affect the application of the *Shell Oil Co., supra,* criteria. *Shell* dealt with requirements for triggering of a favored nation clause in a contract entered into prior to the adoption of the Commission's policies regarding such clauses. 29 F.P.C. at 499. The same tests would be required here.

B. Commission Expertise for Comparison of the Rate Schedule with the Government Lease and Determining the Proper Application of the Area Rate to a Price Adjustment.

The analysis and comparison of the two contracts at issue require the application of principles that are within the special knowledge and expertise of the Commission. The favored nation provision provides for a comparison of the price provisions of the Rate Schedule with the [3]

> "concurrently effective higher price provisions of such subsequent contract; provided that in determining whether a given price is in fact 'higher' than the price provisions of this contract, the inquiry shall not be limited to the actual prices stipulated but due consideration shall also be given to a comparison of all other pertinent provisions of the two contracts, such as point of delivery, basis of measurement, taxes, dehydration, and delivery pressures . . . ."

In the determination of whether the price is, in fact, higher, and, if so, how much higher, the Commission would have to look to all the other provisions of the contract such as point of delivery, payment for extracted products, base of measurement, taxes, dehydration, delivery pressures, as well as other comparable provisions of the two contracts. Additionally, Respondents have styled their claim in state court as a separate claim for "residue gas" and "extracted plant products." The Rate Schedule provides for the sale of a

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[3] The Solicitor General and the Commission (Brief for the United States, p. 3) quote only part of the favored nation provision that is Section 8(D) of the Rate Schedule. They leave out the language quoted here that requires "due consideration . . . be given . . . all . . . pertinent provisions of the two contracts. . . ." The entire Section 8(D) is set out at pages 5-6 of the initial petition to this Court.

wellhead stream of gas with all the liquefiable hydrocarbons contained therein:

> "(b) *The prices hereinabove in this Section 8 provided to be paid by Buyer to Seller shall constitute full payment for all gas delivered hereunder and also for all liquefiable hydrocarbons and other products delivered with such gas, it being understood and agreed that any and all products whatsoever recovered or recoverable from the production delivered hereunder by means of any type of processing operation subsequent to delivery shall be the property of Buyer or its assign without any obligation to make further payment to Seller for such products,* it being further understood and agreed, however, that nothing herein is intended to deprive Seller of the right to operate a standard type oil field separator at each well subject hereto in order to remove such condensate as may be thereby extracted prior to delivery of production hereunder to Buyer. The parties take cognizance of the fact that the aforesaid prices hereinabove provided to be paid are $0.0025 per MCF higher than would have been provided had Seller retained the right to participate in the recovery of products by such processing operations subsequent to delivery, and accordingly the aforesaid prices have been calculated and agreed to by the parties with the intention and understanding that payment of the said prices shall constitute payment for all products whatsoever recoverable from the production delivered to Buyer hereunder." [Emphasis added.]

The provision respecting liquid hydrocarbons recovered at the well separator (condensate) is contained in Section 9 as follows:

> "9. *CONDENSATE.* Buyer, or its assign, shall have the option from time to time and upon sixty (60) days' notice, of purchasing all of the free condensate that may be produced from the subject wells and which may be recovered or recoverable by the use of separators operated in connection with such wells, and measured by liquid meter, or liquid gas ratio tests as hereinafter set forth, and shall accept delivery of such condensate into the gas gathering lines or at Seller's option from Seller's storage tanks located on the leases. Buyer, or its said assign, shall deliver to Seller written notice of the exercise of its said option and may discontinue the purchase of condensate by giving Seller sixty (60) days' written notice that it no longer desires to purchase same.
>
> . . . .
>
> Buyer shall pay or cause to be paid to Seller, for condensate received in accordance with the provisions of this Section, the price posted by Buyer or its said assign, as the case may be. Provided, however, that such posted price shall be in line with the prices established by the majority of major oil companies for similar grade condensate in fields in North Louisiana."

Respondents' claims and related calculations require a radical change in the Rate Schedule to provide them with what the contract denies, that is, a separate settlement for the value of the products manufactured from the liquefiable hydrocarbons contained in the gas sold and for the value of the upgraded condensate produced from their gas wells and processed in Petitioner's plant. These complicated issues of comparison require Commission experience and expertise.

The necessity of exercise of the Commission's special expertise is exemplified by the state courts' decisions as to this aspect of the case. The state courts have found that the lease royalty paid by Petitioner to the United States was computed on a price basis below the maximum area rates. This is true of the royalty paid to the

United States on residue gas. But the state courts have awarded to Respondents a recovery computed on the royalty paid to the United States on the residue gas *plus the royalty paid to the United States on liquids extracted and processed from the gas as produced at the well.* The royalty paid to the United States on extracted and processed liquids amounts to more than the royalty paid on the gas.[4]

Under Respondents' Rate Schedule, the gas sold is the gas as produced at Respondents' wells, including all of the extractible liquids contained in the gas as produced, excepting only condensate extractible at the wellhead. The contract price is a price per Mcf of gas with the extractible liquids, except condensate, contained therein. Supra, pp. 10-11. The area rate price under the Commission's regulations applies to sales of natural gas in interstate commerce, and the same area rate applies to residue gas and to gas sold with extractible liquids contained therein. *Permian Basin Area Rate Case,* 390 U.S. 747, 820 (1968); *Mobil Oil Co.* v. *FPC,* 483 F.2d 1238, 1249 (D.C. Cir. 1973); *El Paso Natural Gas Co.,* 29 F.P.C. 1175, 1179-80 (1963). The Louisiana courts, however, have awarded amounts to the Respondents computed on the area rate ceiling for the gas *plus an amount for extractible liquids contained in the gas which is greater* than the amount awarded for the gas. In fact, the total amount awarded is more than double the area rate ceiling applicable to the gas sold with the liquids contained therein, as provided in Respondents' Rate Schedule.

[4] This is because the royalty was paid to the United States on residue gas and on extracted and processed liquids in accordance with the provisions of the lease.

The state courts' award of more than double the applicable area rate ceiling price has resulted even though they state, and evidently intend, that Respondents recover only up to the area rate applicable to the gas as sold under the contract. The difference in the intention and in the action by the state courts results from their lack of expertise in dealing with residue gas, well gas, condensate and extractible liquids in gas, and the application of the area rate ceiling thereto. These matters clearly come within the special expertise of the Commission.[5]

II.

FEDERAL LAW REQUIRES UNIFORMITY OF RATE REGULATION UNDER THE NATURAL GAS ACT

Even though the Solicitor General and the Commission state that the Commission "undoubtedly" has primary jurisdiction over rate regulation, it is argued that the Commission's role should intrude no further into state law than necessary to carry out the Commission's responsibilities under the *Natural Gas Act.* It is only because the Commission's role would involve interpretation of a contract that they contend there is no need for uniformity. They would leave such interpretation and resultant rate determination to the courts.[6] Given

[5] Additional argument in regard to the state courts' award exceeding the area rate ceiling price is set out in III of this brief.

[6] This is inconsistent with the Commission's recent orders under the Natural Gas Policy Act of 1978, 92 Stat. 3350 (1978), confirming "the Commission's statutory responsibility to examine contracts covering gas subject to the Natural Gas Act." See, Order On Rehearing of Order No. 23, "Amendment and Clarification of the Commission's Interim Regulations Implementing the Natural Gas Policy Act of 1978 and Regulations Under The Natural Gas Act," 44 F.R. 30681 (May 29, 1979).

the primary aim of the *Natural Gas Act,* protection of consumers against exploitation at the hands of natural gas companies, and the Congressional intent of the Act to give the Commission jurisdiction over the rates of all wholesales of natural gas in interstate commerce, *Phillips Petroleum Co.* v. *Wisconsin,* 347 U.S. 672 (1954), Petitioner cannot imagine an issue that requires more uniformity than rate regulation under the *Natural Gas Act.* Indeed, Congress has charged the Commission to administer the *Natural Gas Act* in accordance with the policy of *Phillips.* And the Louisiana state courts, following parochial ideas of state law, have not only failed to consider but have openly and blatantly ignored the underlying purpose of the *Natural Gas Act*—the protection of the consumer.[1] The Commission must have had the opportunity to interpret Respondents' Rate Schedule with that aim as its primary objective. The Commission's role in this regard can and must intrude into state law if necessary to carry out the Commission's responsibilities under the *Natural Gas Act.* As this Court stated in *United Gas Improvement Co.* v. *Continental Oil Co.* ("*Rayne Field* case"), 381 U.S. 392, 400 (1965):

> "A regulatory statute such as the Natural Gas Act would be hamstrung if it were tied down to technical concepts of local law."

The Court noted that Louisiana law was in conflict with the Court's decision in that case because state law did not recognize a sale of gas in place. This decision illus-

[1] As Petitioner has shown in earlier briefs, the stated purpose of the Louisiana courts in their interpretation of Respondents' Rate Schedule was to protect the producer against a rise in the price of gas. See, Petition For Writ of Ceriorari filed in No. 78-986 on December 18, 1978, p. 21. Cf., *Atlantic Refining Co.* v. *Public Service Commission,* 360 U.S. 378, 393 (1959).

trates precisely the reason that the Commission should determine the meaning and legal effect of contracts for the sale of natural gas subject to the Commission's jurisdiction. The Commission determined in the *Rayne Field* case, largely on the basis of the dominant price reducing purpose of the *Natural Gas Act,* that the assignment, or sale, of developed oil and gas leases to an interstate pipeline was, under the *Natural Gas Act,* a sale of gas in interstate commerce. This Court affirmed the Commission's determination stating that a narrow interpretation of the *Natural Gas Act* would "make *Phillips* a shadow." 381 U.S. at 402.

A. The Paramount Nature of Federal Regulatory Law.

The Commission and the courts have recognized the paramount nature of the *Natural Gas Act* over jurisdictional transactions and that federal regulatory law controls as to such transactions. This federal law of Commission decisions and the decisions of the federal courts under the *Natural Gas Act* should be consistently applied to matters concerning producer rate increases for sales of gas in interstate commerce. Under the *Natural Gas Act,* when a gas purchase contract is filed with the Commission, it then takes on the character of a gas rate schedule and as such it is subject to the "paramount and exclusive authority" of the Commission. *Northern Natural Gas Co.* v. *State Corp. Commission,* 372 U.S. 84, 85, 92 (1963). The displacement of state law by federal regulatory law as to the interpretation of contracts on file as rate schedules regarding the triggering of a rate increase has been recognized in both court and Commission decisions. In *Superior Oil Co.* v. *El Paso Natural Gas Co.,* 377 S.W. 2d 691 (Tex. Ct. of Civ. App. 1964), the court was con-

fronted with a suit for a declaratory judgment seeking an interpretation of two purchase contracts containing favored nation clauses which Superior claimed had been triggered. The court held that the resolution of these matters was "preempted" by the application of federal regulatory law. In *Lone Star Gas Co.* v. *Howard Corp.*, 556 S.W.2d 372, 375 (Tex. Ct. of Civ. App. 1977), referring to *Superior Oil Co.*, the court stated:

> "The gas sales contracts of a natural gas company dealing in interstate commerce of gas for resale are controlled by the federal Natural Gas Act, 15 U.S.C.A.,Section 717, et seq. and are subject to the jurisdiction of and regulation of the Federal Power Commission. *Superior Oil* v. *El Paso Natural Gas Co.*, 377 S.W.2d 691; *Phillips Petroleum Co.* v. *Wisconsin*, 347 U.S. 672 (1954)."

So, too, in *Appalachian Power Co.* v. *FPC, supra* at 347, it was held that the Commission had "properly treated [state] law as irrelevant to interpretation of the contract" on file as a rate schedule involving a triggering issue. In that case, the Commission had rejected the rate increase on the basis of *Mobile-Sierra, supra.* Responding to an argument that state law should control the interpretation of the rate schedule triggering issue, the Commission determined as follows, 49 F.P.C. 387, 388 (1973):

> "[S]tate law is not relevant to these wholesale rates, which are under the jurisdiction of the Federal Power Commission . . . Since the contracts are for the sale of electric energy at wholesale in interstate commerce, they are subject to the provisions of the Federal Power Act as interpreted by the Courts. APCO's proposal amounts to an allegation that such sales can be regulated by state law, which is not the case. *FPC* v. *Southern California Edison Co.*, 376 U.S. 205 (1964)."

Similar to these cases, this Court has recently rejected application of state law concepts to gas dedication issues under the *Natural Gas Act.* In *California* v. *Southland Royalty Co.*, 436 U.S. 519, 530-31 (1978), the Court stated:

> "We conclude that the Commission acted within its statutory powers in requiring that respondents obtain permission to abandon interstate service. 'A regulatory statute such as the Natural Gas Act would be hamstrung if it were tied down to technical concepts of local law.' *United Gas Improvement Co.* v. *Continental Oil Co.*, 381 U.S. 392, 400 (1965). By tying the concept of dedication to local property law, respondents would cripple the authority of the Commission at a time when the need for decisive action is greatest. Guided by *Sunray* [*Mid-Continent Oil Co.* v. *FPC*, 364 U.S. 137 (1960)], we believe that the structure and purposes of the Natural Gas Act require a broader view of the Commission's authority."

Also, the Tenth Circuit ruled in *Jicarilla Apache Tribe* v. *FERC*, 578 F.2d 289 (10th Cir. 1978), that "state law concepts of property interests created by oil and gas leases" are inapplicable to a regulatory determination by the Commission as to the jurisdictional rates to be charged by a small producer.[8] In relying on *Mobil Oil Corp.* v. *FPC*, 463 F.2d 256 (D.C. Cir. 1971), *cert. denied sub nom., Mobil Oil Corp.* v. *Matzen*, 406 U.S. 976 (1972), as the controlling federal

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[8] The *Jicarilla Apache Tribe* decision demonstrates that the Commission's primary jurisdiction extends to the regulation of small producers, contrary to the Solicitor's assertion (Brief of the United States, p. 11). Cf., *FPC* v. *Texaco Inc.*, 417 U.S. 380 (1974).

rule of law,[9] the Tenth Circuit determined as follows as to the application of state law, 578 F.2d at 292:

> "[W]e need not, and do not, base our decision on state law concepts of property interests created by oil and gas leases . . . ."

More recently, the Fifth Circuit in *Tenneco Oil Co.* v. *FERC,* 580 F.2d 722 (5th Cir. 1978), referred to the Commission the issue of whether certain natural gas lease-sale agreements were sales of gas in interstate commerce within the meaning of the *Natural Gas Act.*

Other courts have recognized the need for uniformity in application by the Commission of federal regulatory law to producer rate increase filings, and particularly proposed rate increases under favored nation clauses. See *Ashland Oil and Refining Co.* v. *FPC,* 421 F.2d 17 (6th Cir. 1970); *Socony Mobil Oil Co.* v. *Brooklyn Union Gas Co.,* 299 F.2d 692, 695 (5th Cir. 1962), *cert. denied* 371 U.S. 887 (1962) ("[T]his Court does not have the authority to establish rates . . ."); *Mississippi Power and Light Co.* v. *Memphis Natural Gas Co.,* 162 F.2d 388, 390 (5th Cir. 1947), *cert. denied* 332 U.S. 769 (1947) ("To give effect to the 'Favored Nation' clause would operate to transfer the legislative function of ratemaking from the Commission to the courts."); *Bel Oil Corp.* v. *FPC,* 255 F.2d 548 (5th Cir. 1958); *Natural Gas Pipe Line Co.* v. *Harrington,* 246 F.2d 915, 918 (5th Cir. 1957) ("Nor does any court possess such power for the purpose of fixing retroactively a just, reasonable and lawful rate."); *Colorado Interstate Gas Co.* v. *FPC,* 324 U.S. 581 (1945); *Brooklyn Union Gas Co.* v. *Transcontinental Gas Pipeline Corp.,* 201 F.Supp. 673 (S.D. Tex. 1960); *McLeran* v. *El Paso Natural Gas Co.,* 357 F. Supp. 329, 331 (S.D. Tex. 1972), *affirmed,* 491 F.2d 405 (5th Cir. 1974) ("The federal courts lack the authority to determine a just and reasonable rate . . . [and] the courts may not fix a retroactive rate . . . .").

[9] See this brief *infra* at p. 19.

B. *Mobil Oil Corp. v. FPC* is Relevant to the Meaning of the Favored Nation Clause.

The Solicitor General and the Commission argue (Brief of the United States, pp. 14-15) that federal court decisions holding that leasing of gas producing properties is not a jurisdictional sale subject to the *Natural Gas Act* are not relevant to the meaning of the favored nation clause at issue in the case at bar. The Solicitor General and the Commission state that the fact that "such lease arrangements are not 'sales' " of gas within the Commission's jurisdiction under the *Natural Gas Act* does not preclude the conclusion that the parties intended them to constitute "purchase[s] within the meaning of their own contract and as a matter of state law." The Solicitor General and the Commission further argue that a state court decision in conflict with *Mobil, supra,* would not create an "imminent possibility of collision" between state court contract judgments and the Commission's authority to regulate interstate transportation and sale of the natural gas, citing as the sole reason for such statement that the Respondents have "claimed no damages in excess of rate ceilings established by Commission orders." [10]

The Solicitor General and the Commission have given a very narrow interpretation to *Mobil.* The language of the decision itself, 463 F.2d at 262, illustrates that

[10] See discussion of the claims of Respondents in this brief *infra,* p. 29.

the rule is not one limited to defining the scope of the Commission's jurisdiction but was set forth as a broad statement of federal regulatory law:

> "When we come to an ordinary lease by the landowner to the producer there is neither a "customary' sale in interstate commerce nor its equivalent in economic effect.
>
> . . . .
>
> To refer to the royalty owner as engaging in the sale is to depart from the common understanding of the words used, industry parlance, economic equivalent, or any other foundation . . . .
>
> [A]n economic interest in the proceeds of a sale, unaccompanied by authority to determine the incidents of the sale, does not make one a seller.

The term "sale" and its corollary "purchase," then, have the same meaning as to the scope of the Commission's jurisdiction and as to the common meaning of royalty transactions in substance and form. Indeed, it was the "common understanding of the words" that controlled the statutory construction in *Mobil.* It is for this same reason that the rule of *Mobil* is not one limited to defining the scope of the Commission's jurisdiction.

Further analysis of *Mobil* bears out the fact that the court clearly determined as a broad proposition of law that payment of a royalty by the lessee does not constitute a purchase of natural gas. In *Mobil,* the court relied heavily upon this Court's opinion in *Burnet* v. *Harmel,* 287 U.S. 103, 107 (1932):

> "[T]he statute speaks of a 'sale', and these leases would not generally be described as a 'sale' of the mineral content of the soil, using the term either in its technical sense or as it is commonly understood. Nor would the payments made by lessee to lessor generally be denominated the purchase price of the oil and gas. By virtue of the lease, the lessee acquires the privilege of exploiting the land for the production of oil and gas for a prescribed period; he may explore, drill and produce oil and gas, if found. Such operations with respect to a mine have been said to resemble a manufacturing business carried on by the use of the soil, to which the passing of title of the minerals is but an incident, rather than a sale of the land or of any interest in it or in its mineral content. *Stratton's Independence* v. *Howbert,* 231 U.S. 399, 414, 415; see *Von Baumbach* v. *Sargent Land Co.,* 242 U.S. 503, 521."

In applying the Supreme Court's opinion to the setting under the *Natural Gas Act* before it in *Mobil,* the court clearly determined, as a matter of federal regulatory law, that the payment of a royalty by the lessee does not constitute a purchase of natural gas.

Where there exists a body of regulatory law governing the meaning of certain terms which has evolved in a broader context than that of defining jurisdictional terms, it is inappropriate to limit the application of regulatory law on that basis. The Tenth Circuit's recent decision in *Jicarilla Apache Tribe* v. *FERC, supra,* is instructive in this regard. In a case concerning the appropriate rate to be charged by a small producer, the issue involved a determination of whether the lessor's election under a lease to take its royalty payments in kind rather than in cash was "tantamount to a purchase."

Both the Commission and the court looked to *Mobil* as the controlling federal regulatory rule of law and not as a decision limited to the scope of the Commis-

sion's jurisdiction. The court described the Commission's position as follows, 578 F.2d 292:

> "In its brief, the FERC argues that its ruling is supported by *Mobil* . . . That case held that lessors, royalty owners were not engaged in 'sales' of natural gas merely by accepting royalty payments pursuant to their leases. The FERC argues that this conclusion is correct because the entire ownership of the gas produced under the lease is in the lessee." [Footnote omitted.]

The court also referred to *Mobil* in reaching its conclusion, stating, *Id.*:

> "The conclusion in *Mobil Oil,* that royalty owners are not sellers of natural gas, was not based on any concept of ownership or title, however. See 463 F.2d at 259. The court found, rather, that a royalty owner was not a 'seller' in any commonly understood sense of that term. Our decision that the Tribe is not a purchaser of its royalty gas is based on much the same reasoning."

It is, therefore, particularly troubling that the Solicitor General and the Commission would argue that *Mobil* controls only as to the scope of the Commission's jurisdiction and that it does not apply to jurisdictional transactions themselves. That position is inconsistent with both Commission and court decisions which read *Mobil* as the controlling federal regulatory rule of law.

Petitioner submits that if the Louisiana court in 1961 or at any later time had referred the question of interpretation to the Commission, as it was bound under federal and state law to do, the plain terminology of the contract and the overwhelming unanimity of the courts in enforcing the primary purpose of the *Natural Gas Act* would have routinely called for an order from the Commission in favor of Petitioner.

By allowing the state courts of Louisiana to hold that a royalty payment was a "purchase of gas from another party seller" resulting in substantial price increases for the long period of time beginning in September, 1961, is to permit state courts and parochial views of state law to expand the term "sale" in favor of higher prices for the sale of interstate natural gas in past periods *without* the Commission determining these issues under the *Natural Gas Act.* The Louisiana courts' action is in violation of the *Natural Gas Act* and destroys uniformity of rate regulation by the Commission under that statute.

C. The Solicitor's Reliance on *Skelly* and *Pan American* is Misplaced.

The Solicitor General and the Commission rely heavily on two decisions of this Court, *Skelly Oil Co.* v. *Phillips Petroleum Co.,* 339 U.S. 667 (1950), and *Pan American Petroleum Corp.* v. *Superior Court,* 366 U.S. 656 (1961), to support the argument that the Commission's exercise of jurisdiction is not required in this case. An analysis of the two decisions reveals that neither of them is applicable to the issue of a producer rate increase under a favored nation clause of a Commission Rate Schedule.

(i) *Skelly Oil Co. v. Phillips Petroleum Co.*

The Solicitor General and the Commission argue that *Skelly* limits the applicability of the federal regulatory rule of law embodied in *Mobil* to issues of statutory construction (Brief of the United States, p. 12). In *Skelly,* a natural gas pipeline company had sought from the Commission a certificate of public convenience and necessity. In order to satisfy the prerequisite of adequate reserves of gas, the pipeline entered into a

contract to purchase gas from Phillips which in turn entered into contracts with Skelly, among others, to purchase gas for resale to the pipeline. The latter contracts contained a provision giving the sellers the right, after a certain date, to terminate the contract by notice given before issuance of a certificate by the Commission. Such notices were given two days after the Commission had ordered issuance of the certificate but before the actual content of the order was made public.

In construing the contract, the Court of Appeals equated the terms of the contract with that in the statute and assumed its problem to be the construction of what constitutes the "issuance" of a "certificate of public convenience and necessity" within the meaning of Section 7(c) of the *Natural Gas Act*, 15 U.S.C. § 717f(c). The Supreme Court remanded the case for a more thorough consideration of the application of the *Natural Gas Act*, and it suggested that the lower courts also consider the scope of the language in the construction of Section 7(c) of the *Natural Gas Act*, because the parties might not have intended to equate the statute and the contract. The Supreme Court stated in this context that the "parties do not necessarily endow statutory language in a contract with the scope of the statute, particularly when the same *term may have variant meanings for different applications of the statute.*" 339 U.S. at 678. (Emphasis added.)

At the outset it should be understood that *Skelly* did not involve any question as to the Commission's rate jurisdiction or the interpretation of a jurisdictional rate schedule. This is because at the time of the *Skelly* decision, 1950, the Commission did not yet exercise jurisdiction over producer sales. This Court's decision in *Phillips Petroleum Co.* v. *Wisconsin, supra,* did not

occur until several years later in 1954. Since the producer contracts were viewed as being non-jurisdictional they were not thought to be within the Commission's control and were not filed with the Commission. This fact which the Solicitor General and the Commission apparently have overlooked undercuts their argument that *Skelly* could limit the applicability of *Mobil* to issues of statutory construction. This is the case even apart from the showing by Petitioner that *Mobil* is a broad rule of federal regulatory law which is not so limited. Again, if the contracts in *Skelly* had been viewed as jurisdictional contracts they would have been on file with the Commission as rate schedules so that the interpretation of the term "issue" may have been treated differently. Cf. *Appalachian Power Co., supra.*

In any event, the interpretation of the term "sale" in *Mobil* does *not* have a "variant meaning" either "for different applications of the statute" (as was the case in *Skelly*) or even in common industry parlance.[11] *Mobil*, 463 F.2d at 262. In applying the Supreme Court's opinion to the setting under the *Natural Gas Act* before it in *Mobil*, the court clearly determined, as a matter of federal regulatory law, that the payment of a royalty by the lessee does not constitute a purchase of natural gas.

(ii) Pan American Petroleum Corp. v. Superior Court

The *Pan American* decision is inapplicable for reasons similar to the inapplicability of *Skelly*.

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[11] So, too, the Commission had reached the same result in *Morris Mizel, et al., supra.* In that case, the Commission held that a farmout agreement did *not* constitute a "purchase" so as to activate a favored nation clause. See 30 F.P.C. at 1104.

Pan American did *not* concern the determination of the level of rates at which natural gas could have been sold for resale in interstate commerce. Rather, the Court in *Pan American* held that the state-court plaintiff was entitled to receive a *refund of payments which were over and above the rates on file* with the Commission under a Kansas minimum price law which was subsequently determined by the Supreme Court to be void *ab initio*. The suit was on a quasi-contract at common law by the pipeline purchaser, as plaintiff, to require a refund of these *excess* monies which the defendant-producers had exacted from the plaintiff under the minimum price law. The defendants urged that it was a claim arising under the *Natural Gas Act* of which the federal *courts* were given exclusive jurisdiction. It was actually a suit to recover monies that had been unlawfully collected from the pipeline. There was absolutely no question involved concerning the Commission's primary or exclusive jurisdiction regarding rates for the sale of gas in interstate commerce.

The basic question in *Pan American* was whether the pipeline's case should have been initiated in federal rather than state court. Since the plaintiff was seeking merely to be refunded excess payments above the established rate on file with the Commission, there was simply no statutory jurisdiction of the case in the federal courts. The case only involved the well-pleaded complaint rule of federal court jurisdiction. Cf. *Skelly Oil Co.* v. *Phillips Petroleum Co., supra,* and *Gully* v. *First National Bank,* 299 U.S. 109, 112, 113 (1936). The plaintiff had pleaded a state cause of action—refund of monies allegedly overpaid to defendant. 366 U.S. at 662-63.

If the issue in the present proceeding were whether Respondents (as plaintiffs in the state court) could

have instituted their case in federal court, then *Pan American* might have some application.[12] However, it has utterly no application to the primary and exclusive rate jurisdiction of the Commission.

In *Lewis* v. *Transcontinental Gas Pipe Line Corp.,* 200 F.Supp. 219, 220 (S.D. Tex. 1961), *Pan American* was urged as a defense in a suit to determine the scope of a certificate of public convenience and necessity issued by the Commission. The issue in the case was whether the plaintiff must exhaust his administrative remedies with the Commission prior to seeking judicial relief. The court recognized that *Pan American* did not apply to the determination of agency versus court jurisdiction:

> "We do not think said case is controlling here. In that case, the Supreme Court did not deal with the question of administrative remedies or the exhaustion of the same. That case involved purely and simply a question of Federal v. State jurisdiction; or more simply stated, the question of whether a Federal Court or a State Court had jurisdiction of the case."

Clearly, *Pan American* has no application here. Respondents in the instant case sought in the Louisiana

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[12] Again, however, *Pan American* involved a suit to refund overcharges or collections in excess of the rate on file with the Commission, which is different from Respondents' state court action here in *seeking an increase in rate levels. Pan American* would have direct application to the instant case only if Respondents were suing for a refund of excess collections. There is a major jurisdictional difference between a suit to recover overcharges or collections in excess of the rate on file with the Commission and Respondents' state court action in seeking an increase in rate levels. The difference is explained in *Socony Mobil Oil Co.* v. *Brooklyn Union Gas Co., supra,* and in Petitioner's Reply Brief of January 29, 1979 at page 6, n. 7.

state courts an increase in the rate at which natural gas has been sold by them to Petitioner, under the authority of a Certificate and Rate Schedule controlled by the Commission for the long period 1961 through 1975. No court, either federal or state, has the power to determine the price at which the sale of interstate natural gas can be made, that function being exclusively delegated to the Commission under specific directive from the United States Congress in the *Natural Gas Act*. See, *supra*, pp. 18-19. Respondents' claim for an increase in the price at which gas was sold during this period of time should have been properly submitted to the Commission in the first instance because the Commission is the administrative body with the primary and exclusive adjudicative responsibility for the determination of the rates at which natural gas is to be sold in interstate commerce.

III.

THE STATE COURT DECISIONS INFRINGE ON THE COMMISSION'S REGULATORY RESPONSIBILITIES UNDER THE NATURAL GAS ACT

Not only have the decisions of the Louisiana courts infringed upon the jurisdiction of the Commission and its regulatory responsibilities under the *Natural Gas Act* by having given effect to a favored nation clause of Respondents' Rate Schedule without a determination by the Commission that such activation of the favored nation clause is consistent with the federal regulatory law or that such activation would be within the public interest under the *Natural Gas Act;* but also, (1) the Louisiana courts have determined, in violation of the *Natural Gas Act,* the rate at which natural gas could and should have been sold in interstate commerce for the entire period September, 1961, through December,

1975; (2) the Louisiana courts have assumed that Respondents' calculations and adjustments for the purposes of comparing Respondents' Rate Schedule with the Government lease transaction are in accordance with the *Natural Gas Act;* and (3) the Louisiana courts have assumed that Respondents' claims for the period 1961 through 1975 would not exceed the applicable area or ceiling rates promulgated by the Commission under the *Natural Gas Act*. These actions by the Louisiana courts are in direct conflict with the *Natural Gas Act* and the regulations of the Commission.

Of particular significance in the case is the treatment of liquefiable hydrocarbons (or "extractible liquids," an interchangeable term). See pp. 10-12, *supra*. The Respondents have cast their claim as a separate claim for "residue gas" and "extracted plant products" for the very purpose of avoiding the *Natural Gas Act*. An inspection of Respondents' Rate Schedule (see pp. 10-11, *supra*) shows that Respondents sell raw wet gas at the wellhead for a price slightly higher than they would have received had the contract contained means whereby they could be paid for extracted products. See, *Sunray Mid-Continent Oil Co.* v. *FPC,* 290 F.2d 552 (10th Cir. 1961). The sale is a sale of raw wet gas with all of the liquefiable hydrocarbons contained therein. Respondents have claimed that payments for liquefiable hydrocarbons contained in the gas as sold to Petitioner are payments for "extracted products" and thus are not subject to Commission jurisdiction under the *Natural Gas Act*. However, *Natural Gas Act* jurisdiction clearly covers this wellhead sale of natural gas and all the entrained liquids. *Permian Basin Area Rate Case,* 390 U.S. 747, 820 (1968); *Mobil Oil Corp.* v. *FPC,* 483 F.2d 1238, 1249 (D.C. Cir. 1973); *El Paso*

Natural Gas Co., 29 F.P.C. 1175, 1179-80 (1963). The Examiner's decision in the latter case stated as follows, 29 F.P.C. at 1207-08:

> "What is sold and delivered under these contracts is not liquid hydrocarbons at all, but is natural gas, all of which is delivered at the mouth of the wells or at the outlet of the separator (if one is installed at the wellhead)."

Thus, Respondents and the Louisiana courts have made a change in their Rate Schedule without Commission approval providing for a separate settlement of "extracted products" and "residue gas" when in fact the sale under the Rate Schedule was of wet gas and all liquefiable hydrocarbons contained therein. ***There is no sale of "extracted plant products" or "residue gas."***

Under the *Natural Gas Act*, the only way in which this Rate Schedule could have been changed is by agreeing with the Petitioner as to a change in the contract and filing such agreement with the Commission as a supplement to the Rate Schedule. *Sunray Mid-Continent*, 290 F.2d at 555. Respondents have not done so, but rather, have sued in state court for an alteration of the terms of the contract to provide for the circumstances of a sale of extracted plant products and residue gas, when, in fact, the sale was of raw wet gas at the wellhead.

The purpose for which Respondents have made such a claim is that the royalties paid to the Government on gas produced by Petitioner were based on separate values of residue gas and extracted plant products after processing. It is by converting the sale by Respondents to Petitioner under the Rate Schedule from a wellhead sale to a transaction exactly like the royalty transaction that the Respondents have, in effect, avoided compliance with the *Natural Gas Act*.

The Solicitor General and the Commission's position in deferring to the erroneous interpretation by the Louisiana state courts as to what constitutes a wellhead sale places unlawful limits on the Commission's rate jurisdiction over extractible liquids in violation of *Phillips Petroleum Co.* v. *Wisconsin, supra.* Cf., *Tenneco Oil Co.* v. *FERC, supra.* To interpret a contract for the sale in interstate commerce of gas containing extractible liquids as permitting an additional price for the extractible liquids above the applicable wellhead area rate ceiling would totally defeat the purpose of the *Natural Gas Act*. That is what the Louisiana state courts' interpretation of the contract in this case will do.

IV.

CONCLUSION

Congress conferred upon the Commission exclusive jurisdiction under the *Natural Gas Act* to determine the rates at which natural gas could be sold in interstate commerce for resale. The Louisiana state courts have infringed upon that jurisdiction. First, they failed to refer the case to the Commission for decision. Then, they made determinations of the applicable rate for past periods. If state courts may interpret gas rate schedules in conflict with the *Natural Gas Act* and, if the state courts may determine the rate at which natural gas could have been sold during past periods, the very purpose for which the *Natural Gas Act* was enacted, protection of the consumer, will be jeopardized by the efforts of state courts to protect local policies and interests.

Respectfully submitted,

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